

The New Abridged Reporter's Privilege: Policies, Principles, and Pathological Perspectives

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This Article contends that contemporary arguments about the reporter's privilege are increasingly situated within a divided framework in which protections for confidential and nonconfidential information are treated as separate interests that lack a shared theoretical justification. This is both a cause and consequence of a broader tendency among judges, legislators, journalists, and lawyers to emphasize policy-based conceptions of the privilege that are focused on case-specific calculations of harms and benefits, rather than principle-based conceptions focused on journalistic autonomy and the need for a structural separation of press and government.

Policy arguments present the privilege as a narrow, utilitarian device for eliciting public-interest disclosures from sources, not as a fundamental right tied to the investigative and expressive autonomy of those who gather and report news. Policy-based conceptions of the privilege are therefore more vulnerable to uneven applications, more likely to be reserved for particular types of proceedings, more likely to be balanced away in the face of competing social concerns, and more likely to exclude non-traditional journalists. In addition, policy-based conceptions devalue the journalistic foundations of the privilege by tying its value to the preservation of sources' expression while at the same time minimizing the effect of subpoenas on reporters' expression.

This Article shows that lawyers and legal scholars have also narrowed their conceptions of the privilege—sometimes unwittingly and sometimes as part of a deliberate, “pathological” effort to preserve some core protections by surrendering others. In doing so, they have contributed to the broader conceptual compression that is evident in the scholarly literature, public discourse, and debates over proposed state and federal shield laws, which increasingly reduce the privilege to merely a protection for confidential sources and that permit a host of other qualifications and exceptions.

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I. INTRODUCTION

For nearly four decades, journalists have actively sought judicial recognition of a First Amendment reporter's privilege¹ that would free their newsgathering and preserve their independence by shielding them from certain subpoenas.² Those supporting the privilege have traditionally rooted their arguments in the principle of autonomy and have relied on a combination of instrumental and fundamental-rights rationales. The instrumental arguments focus on the free flow of information,³ the utility of

¹ Most versions of the privilege give journalists a qualified right to refuse to comply with subpoenas seeking their testimony or work products absent a showing by the subpoenaing party that it has a compelling need for information in the journalist's possession, that the information is relevant to the proceeding, and that it is not available through alternative channels. See *Branzburg v. Hayes*, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting). In *Branzburg*, the Supreme Court refused to recognize a First Amendment reporter's privilege in the context of a federal grand jury proceeding. However, Justice Lewis Powell cast the decisive vote in a concurring opinion that sought to limit the majority ruling to the specific facts presented, leaving open the possibility that a privilege could be recognized in other contexts. As a result, many lower federal courts have since recognized some form of the privilege, and many have endorsed the criteria outlined in Justice Stewart's *Branzburg* dissent, which suggested that before journalists are asked to reveal their sources, the government should be required to: (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information. *Id.* at 743 (Stewart, J., dissenting).

² Subpoenas can be for testimony (*ad testificandum*) or work products (*duces tecum*), and they can be issued by courts, lawyers (acting as officers of the court) or legislative bodies.

³ See, e.g., SOC'Y OF PROF. JOURNALISTS, FREE FLOW OF INFORMATION ACT TALKING POINTS, <http://www.spj.org/pdf/freeflowinfo.pdf> (last visited Jan. 19, 2010) (arguing that "an informed citizenry is crucial to democracy and helps keep our

confidentiality as a means of gaining access to hidden information,⁴ and the risk that sources will be less forthcoming in the absence of a privilege.⁵ The rights-based arguments, meanwhile, suggest that the Constitution compels a strict separation between press and government,⁶ and that without some evidentiary shield, journalists would be prone to harassment, intimidation, and other encumbrances on their independent acquisition and dissemination of news.⁷ Although these lines of argument are often conflated by journalists and their advocates—and even more often by their opponents—they have been embraced by dozens of courts and legislatures, most of which have recognized a privilege⁸ that may be claimed in a variety of legal contexts and that typically protects both confidential⁹ and nonconfidential information.¹⁰

government accountable.”); Christine Tatum, *Federal Shield Would Protect Public's Right to Know*, <http://www.spj.org/rrr.asp?ref=58&t=foia> (last visited Jan. 19, 2010).

⁴ See, e.g., Irwin Gratz, *The Case for a Federal Shield Law*, SPJ NEWS, July 20, 2005, <http://www.spj.org/news.asp?ref=512> (“[T]here’s little denying reporters sometime [sic] need to promise confidentiality. Some of the greatest investigative stories of our age have relied on them.”).

⁵ See, e.g., *In re Taylor*, 193 A.2d 181, 185 (Pa. 1963) (“We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up . . . unless newsmen are able to fully and completely protect the sources of their information.” (emphasis omitted)).

⁶ These arguments suggest that the First Amendment, specifically the Press Clause, requires some division of journalists and government, and that this is an intentional feature of the Constitutional design. See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633–34 (1975) (arguing that the Press Clause is a “structural provision” that protects the “institutional autonomy of the press.”).

⁷ See, e.g., *Branzburg*, 408 U.S. at 725 (1972) (Stewart, J., dissenting) (warning that without some protection against subpoenas, prosecutors could “annex the journalistic profession as an investigative arm of government.”); see also Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 39 (2005) (“A strong and effective journalist-source privilege is essential to a robust and independent press . . .”).

⁸ Several federal circuit courts have recognized a qualified privilege. *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993); *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181 n.82 (1st Cir. 1988); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986). Two circuits have explicitly rejected the privilege. *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003); *In re Grand Jury Proceedings (Storer Commc'ns, Inc. v. Giovan)*, 810 F.2d 580 (6th Cir. 1987) [hereinafter *Storer Commc'ns Proceedings*]. Other courts have recognized varying levels of protection under the First Amendment, state constitutions, state or federal common law, or state and federal administrative procedures. Thirty-seven states and the District of Columbia have passed shield laws that provide a statutory privilege. See generally

More recently, however, there has been a shift of emphasis and a conspicuous narrowing of some judicial, legislative, and popular conceptions of the privilege. Beginning in the late 1990s, some courts began to pull back from what had been a two-and-a-half decade period of reporter's privilege expansion. The Seventh Circuit catalyzed that shift in 2003 in an extraordinary opinion written by Judge Richard Posner in which the court not only refused to recognize a First Amendment or common law reporter's privilege, but it also castigated those courts that had done so, accusing them of ignoring or misunderstanding the central tenets of the U.S. Supreme Court's 1972 ruling in *Branzburg v. Hayes*.¹¹ Judge Posner seemed especially disgruntled by those courts that had extended the privilege to *nonconfidential* information. Any court that does so, Posner said, is "skating on thin ice."¹²

This attenuated view in which the privilege is limited to confidential source protections, if it is acknowledged at all, is now commonly highlighted in public discussions as well. Debate over the proposed federal shield law,¹³ for example, has focused almost entirely on the sanctity of confidential source relationships and the value of leaks as a tool for preserving

Reporters Committee for Freedom of the Press, Privilege Compendium, <http://www.rcfp.org/privilege/index.php> (last visited Jan. 19, 2010). And Congress is considering a federal shield law. *See infra* note 13.

⁹ This generally includes both the identities of confidential sources and other materials that, if made public, could expose the identity of a source.

¹⁰ This generally includes reporters' work products (notes, video outtakes), which reporters generate themselves, or documentary materials (reports, memos), which journalists acquire from other sources.

¹¹ *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

¹² *Id.* at 533.

¹³ On February 11, 2009, Rep. Rick Boucher and Rep. Mike Pence introduced H.R. 985, a bill known as the Free Flow of Information Act of 2009, which the House passed on a voice vote on March 31, 2009. H.R. 985, 111th Cong. (2009). It is substantively the same bill that the House passed overwhelmingly in 2007. H.R. 2102, 110th Cong. (2007); 156 Cong. Rec. 4209 (2009). The Senate's 2007 version of that bill, S. 1267, 110th Cong. (2007), was never brought to the floor for a vote. On February 13, 2009, Sen. Arlen Specter reintroduced the Senate bill as S. 448, 111th Cong. (2009). As of this writing, the Senate Judiciary Committee has approved the bill but the full Senate has yet to vote on it. The two bills presented in the 111th Congress are very similar in that they provide qualified protection for reporters to conceal their confidential information. H.R. 985, 111th Cong. (2009); S. 448, 111th Cong. (2009). The House bill goes further, however, by protecting nonconfidential information, whereas the Senate bill explicitly excludes protection for nonconfidential information. H.R. 985, 111th Cong. § 2 (2009). However, the House bill's definition of journalist is much narrower than the one in the Senate bill, and only protects those who practice journalism for a "substantial portion of the person's livelihood or for substantial financial gain." *Id.*

government accountability. In addition, congressional testimony,¹⁴ newspaper editorials,¹⁵ and other public communications¹⁶ are almost completely devoid of arguments related to nonconfidential information or the broader autonomy principles that undergird the privilege, yet all highlight the need to maintain an expressive channel for whistleblowers and other anonymous speakers.¹⁷

All of this rhetorical framing encourages a one-dimensional view of the privilege that is oriented around source confidentiality even though 97% of journalist subpoenas are for nonconfidential information.¹⁸ More importantly, by focusing on confidentiality and employing instrumental arguments—that allowing reporters to protect their sources will yield some immediate and demonstrable social benefit—proponents of the privilege pull it from its theoretical moorings and essentially recast it as a negotiable policy preference rather than an a priori principle. This enables courts and legislatures to selectively apply the protection. It also neglects the fact that the protections for confidential and nonconfidential information are both

¹⁴ Nearly all of the June 14, 2007, hearing before the House Judiciary Committee dealt with the issue of confidentiality and the impact of a shield on reporters' source relationships. *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 105–06 (2007) (letter from Dennis A. Cardman, Acting Director of American Bar Association). No attention was focused on nonconfidential information, even though the House bill would protect nonconfidential information. *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2–8 (2006) (statement of Paul J. McNulty, Deputy Att'y Gen.).

¹⁵ Of the hundreds of editorials written between 2005 and 2008 about the various versions of the Free Flow of Information Act, nearly all characterize it, as the *New York Times* did, as a measure that would “give reporters limited protection against being compelled to reveal confidential sources in federal court.” Editorial, *Protecting a Basic Freedom*, N.Y. TIMES, Apr. 21, 2008, at A20. This is not an inaccurate description, but it's incomplete, because it reduces the privilege to solely a protection for confidential sources.

¹⁶ See, e.g., SOC'Y OF PROF. JOURNALISTS, *supra* note 3 (“Compelling reporters to . . . reveal the identity of a confidential source, will restrict the flow of information to the public.”).

¹⁷ This is surprising because the House and Senate bills are split on this point, with the House bill protecting nonconfidential information and the Senate bill protecting only confidential information. See *supra* note 13.

¹⁸ RonNell Andersen Jones, *Avalanche or Undue Alarm: An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 626, 643 (2008) (indicating that newspapers and broadcast stations received an estimated 7244 subpoenas in 2006, only 213 of which were for confidential information).

products of the same Fourth Estate philosophy,¹⁹ and that any attempt to jettison one in order to save the other ultimately damages both.

Nevertheless, some news organizations and their lawyers are being forced to make a pragmatic choice to accept a truncated version of the privilege that is limited to source protection—or that is saddled with other qualifications and exceptions—or risk losing the protection altogether. Some of the journalists lobbying for shield-law protection, for example, have concluded that they should “take what [they] can get.”²⁰ And Eve Burton, general counsel for the Hearst Corporation, says the shifting attitudes among judges, particularly in the federal courts, have led lawyers to be more cautious in their responses to subpoenas.²¹ Indeed, an exhaustive 2006 survey of daily newspapers and broadcast news organizations revealed that those organizations complied fully with 60% of all subpoenas issued that year,²² and that even in states with shield laws they complied fully, with no opposition more than half the time.²³

These tactical responses could be manifestations of what Vincent Blasi calls the “pathological perspective” of the First Amendment,²⁴ which suggests that the impulse to suppress speech is a kind of social pathology that metastasizes during times of crises.²⁵ It is prudent, therefore, to surrender

¹⁹ Edmund Burke first used this phrase to refer to the press gallery in the House of Commons. Today it is used not only as a general reference to the press but also as a way of characterizing the press’ societal role, which is to serve as an institution outside of government that monitors and exposes the abuses of powerful interests. *See generally* LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* (1991). This is also referred to as the watchdog function of the press. *See, e.g.*, TIMOTHY W. GLEASON, *THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA*, 4–5 (1990).

²⁰ David Westphal, *Secrets and Subpoenas*, AM. EDITOR, Mar. 2007, at 4 (quoting *San Francisco Chronicle* reporter Lance Williams).

²¹ Telephone Interview with Eve Burton, Vice President and General Counsel, Hearst Corp. (June 18, 2009).

²² Jones, *supra* note 18, at 661.

²³ *Id.* at 662. The compliance rate in states without shield laws was 73.9% and 54.4% in states with shield laws. *Id.* The author notes, however, that some news organizations, especially broadcasters, did occasionally negotiate with the subpoenaing party to narrow the scope of the request. *Id.* at 664–65.

²⁴ Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

²⁵ *Id.* at 450; *see also* FREDRICK S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476–1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL* 10 (1952) (“The area of freedom contracts and the enforcement of restraints increases as the stresses on the stability of the government and the structure of society increase.”).

some peripheral protections to ensure that the most “serious, time-honored”²⁶ freedoms remain intact during “pathological” periods.²⁷ Although lawyers cannot be expected to try to reshape the law when their overriding obligations are to serve their clients’ interests, a collateral consequence of these responses could be to entrench or exacerbate a judicial pull-back. They could also add to the conceptual compression that is apparent in public discourse²⁸ and some scholarly work²⁹ in which the privilege is reduced to solely a protection for confidential sources or is otherwise laden with exceptions.

All of these issues are of special concern because journalists are increasingly being targeted to reveal the products of their newsgathering efforts;³⁰ many courts are refusing to recognize those protections or are feebly enforcing them;³¹ some judges are imposing exceedingly harsh

²⁶ Blasi, *supra* note 24, at 477.

²⁷ *Id.* at 450 (“‘Pathology’ in the sense I use the term is a social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas.”). This is arguably a pathological period in that federal prosecutors have shown little restraint in subpoenaing journalists, and several journalists have been sent to jail by federal judges for refusing to divulge their confidential sources. *See* REPORTERS COMM. FOR FREEDOM OF THE PRESS, SHIELDS AND SUBPOENAS: THE REPORTER’S PRIVILEGE IN FEDERAL COURTS (2009) [hereinafter SHIELDS AND SUBPOENAS], http://www.rcfp.org/shields_and_subpoenas.html.

²⁸ *See infra* Part IV.D.

²⁹ *See, e.g.*, Laurence B. Alexander, *Looking out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97, 101 (2002) (arguing that a privilege should be reserved for journalists and not necessarily all people who serve journalistic functions); Christopher J. Clark, *The Recognition of a Qualified Privilege for Non-Confidential Journalistic Materials: Good Intentions, Bad Law*, 65 BROOK. L. REV. 369, 379 (1999); Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter’s Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 386 (2006) (rejecting the assumption that in the absence of a privilege, sources will be reluctant to speak to the press); *see also* *infra* Part IV.D.

³⁰ *See* Jones, *supra* note 18, at 638. One recent high-profile case that illustrates the problem involves Cook County (Ill.) State’s Attorney Anita Alvarez and several student participants in the Innocence Project at Northwestern University. After the students produced a report claiming an alleged murderer had been wrongly convicted in 1978, Alvarez subpoenaed the students’ notes, tapes, and transcripts, as well as their course syllabi, grades and other academic records, which Boston University Professor T. Barton Carter characterized as “one of the great fishing expeditions of all time.” Dan Fletcher, *Medill Case: Are Student Journalists Protected?*, TIME.COM, Oct. 22, 2009, <http://www.time.com/time/nation/article/0,8599,1931682,00.html>.

³¹ *See, e.g.*, *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 972–73 (D.C. Cir. 2005) (refusing to recognize a federal common law privilege) [hereinafter *Judith*

contempt penalties on noncompliant journalists;³² the circuit courts are split in terms of both theory and doctrine;³³ and Congress and several state legislatures are actively debating the need for statutory protections.³⁴ And all of this is occurring at a time when technological shifts and professional trends are forcing the country to reexamine the core purposes of the First Amendment, the relationship between journalists and government, and the meaning of “the press.”³⁵

This Article suggests that contemporary arguments about the reporter’s privilege are increasingly situated within a bifurcated framework in which protections for confidential and nonconfidential information are treated as separate interests that lack a shared theoretical justification. This is both a cause and consequence of the more general tendency among all parties to employ policy-based conceptions of the privilege in which the balancing of interests is focused on the most immediate and demonstrable consequences, rather than principle-based conceptions that take account of the importance of press autonomy and the role of the press in the broader social-democratic architecture. Policy-based conceptions of the privilege are more vulnerable to ad hoc manipulations, more likely to be reserved for particular types of proceedings, more likely to be balanced away in the face of competing social concerns, and more susceptible to cramped applications that exclude non-traditional journalists. These conceptions also devalue the newsgathering dimensions of the privilege by fixing its value to the preservation of sources’ expression, while at the same time minimizing the effect of subpoenas on

Miller Subpoena]; *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (refusing to recognize First Amendment reporter’s privilege).

³² Federal Judge Reggie Walton, for example, held *USA Today* reporter Toni Locy in contempt after she refused to comply with a confidential-source subpoena in the Privacy Act case filed by former Army scientist Stephen Hatfill. *See infra* notes 135–36 and accompanying text. Walton ordered Locy to pay \$500 per day for the first seven days she refused to comply, \$1000 per day for the next seven days, and \$5000 a day for the next seven, after which Walton said he would reassess the dispute. He also prohibited Locy from receiving assistance from anyone, including her employer, thus raising the specter of a reporter being forced to choose between personal bankruptcy and the protection of her sources. *See generally* SHIELDS AND SUBPOENAS, *supra* note 27.

³³ *See infra* Part III.

³⁴ *See supra* note 13, describing the federal shield bills. *See also infra* Part IV.A–B, describing the activity in Congress and the state legislatures.

³⁵ Courts and legislatures are substantially divided on the extent to which the privilege should protect bloggers, freelancers, and other non-traditional journalists, and it is a key point of separation between the two federal shield bills currently before Congress, with the House bill favoring a narrow definition focused on traditional practitioners and the Senate bill using a broader definition that would clearly encompass most serious bloggers. *See supra* note 13.

reporters' expression. To the extent that journalists and their advocates are embracing this divided model as a strategic response to legislative or judicial activity, they not only misperceive the extent of the legal retreat, they make it more likely by undercutting some of the central arguments that support the privilege.

Part II of this Article describes two key interpretive tracks that pervade the judicial, legislative, scholarly, and public treatments of the reporter's privilege (a *policy* model that relies on instrumental arguments and a *principle* model supported by autonomy/fundamental-rights arguments) and the theoretical and doctrinal implications of each. Part III shows more concretely how the courts have characterized the privilege, which interpretive models they have favored, and how those choices have affected the judicial transition from a period of reporter's-privilege expansion (roughly from *Branzburg* through the late 1990s) to the current "pathological" period in which the scope and strength of the privilege are contracting. Part IV looks at how legislatures and media lawyers have responded to these shifts, and at how scholars, journalists, and others have framed the privilege issue in their writings and public discourse. Part V concludes by highlighting the Article's central contentions and providing some recommendations for journalists, lawyers, judges, and policymakers.

II. THEORETICAL FRAMEWORK: POLICY V. PRINCIPLE

The theoretical foundations of the reporter's privilege are hard to isolate because there are so many different expressions of the privilege and so many legal mechanisms by which it is secured. Courts have recognized the privilege as a First Amendment principle,³⁶ as an aspect of state constitutional law,³⁷ and as a procedural rule under federal³⁸ and state³⁹ common law. In addition, thirty-seven states have passed shield laws

³⁶ See *supra* note 8.

³⁷ See, e.g., *Zelenka v. State*, 266 N.W.2d 279, 286 (Wis. 1978).

³⁸ See, e.g., *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979). According to the Federal Rules of Evidence, the federal common law of privileges applies to all actions in the federal courts that are based on federal law. FED. R. EVID. 501. When a case involves state law, the common law of the relevant state applies. *Id.* Journalists, like all parties in federal cases, are also protected by the Federal Rules of Civil Procedure, which prohibit the subpoenaing of material that is unnecessary or duplicative, FED. R. CIV. P. 26(c), and the Federal Rules of Criminal Procedure, which prohibit the parties from "fishing" for evidence that is not relevant or that would be inadmissible at trial. *United States v. Nixon*, 418 U.S. 683, 700 (1974) (explaining FED. R. CRIM. P. 17(c)). The federal rules also require courts to quash any subpoena that "subjects a person to undue burden." FED. R. CIV. P. 45(c)(3)(A)(iv).

³⁹ See, e.g., *Senear v. Daily Journal-Am.*, 641 P.2d 1180, 1182 (Wash. 1982).

providing statutory protection,⁴⁰ and the Justice Department has adopted guidelines regarding the issuance of subpoenas against journalists in federal cases.⁴¹ The arguments used to justify these protections are equally varied. But those differences are not merely the products of the peculiar situations in which these issues arise; they are the result of broader conceptual differences.

At the macro level, the rationales emphasized by supporters of the privilege are separable by the degree to which they argue from policy versus principle. Ronald Dworkin distinguishes these two by suggesting that a policy “sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community,” whereas a principle is “a standard that is to be observed . . . because it is a requirement of justice, or fairness or some other dimension of morality.”⁴² Principle-based arguments present the privilege as a fundamental right that is essential to preserving people’s investigative and expressive autonomy.⁴³ They treat the privilege as a presumptive barrier that requires no contextual activation. The protection exists and can only be overcome, if at all, by the presence of some extraordinary condition. Policy arguments, on the other hand, emphasize the social or individual benefits to be gleaned from the privilege and are more focused on situation-specific calculations of costs and benefits.

Despite their differences, these frameworks are capable of overlapping applications. Those arguing from policy could, depending on the values they assign to the various benefits and detriments they identify, propose a privilege that is even more protective than one outlined by someone arguing from principle.⁴⁴ But pure arguments from principle are *more likely* to be

⁴⁰ See Privilege Compendium, *supra* note 8.

⁴¹ 28 C.F.R. § 50.10 (2009). These guidelines were originally promulgated in 1970 and currently require, *inter alia*, that the need for the information sought be balanced against the First Amendment interests of the reporters, that reasonable attempts be made to secure the information from other sources, and that federal prosecutors negotiate with the media organization prior to issuing the subpoena. *Id.*

⁴² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977). Not only are those core values the foundation for many constitutional provisions, the constitutional design itself is an expression of principle, so that actions that conflict with the essential democratic-governmental structure can be challenged as affronts to principle.

⁴³ See, e.g., Victor Kovner, *Are Journalists Privileged?*, 29 CARDOZO L. REV. 1363, 1364 (2008); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1275 (2005); Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975).

⁴⁴ This is possible in part because those arguing from principle are unlikely to favor unqualified protections. No Supreme Court Justice has proposed an absolutist interpretation of the First Amendment. Justices Hugo Black and William O. Douglas came close, see *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (“I

made in support of broad reporter's privilege protections and are more likely to be linked to constitutional provisions. Of course, much of the difference between these approaches can be explained by the differences between constitutional and statutory law. We expect those debating constitutional provisions to argue from principle, because the Constitution exists in part to preserve core liberties. Statutory law, on the other hand, is usually more utilitarian and is designed to direct people's day-to-day social involvements, so it would be reasonable to assume that the choice of framework is simply a function of the legal context.⁴⁵

There is no clear alignment, however, of principle-constitutional on one side and policy-statutory on the other, nor should there be. They often track this way, but statutes are occasionally adopted in service of principle, to fill in gaps left by the courts or to right the courts' errors.⁴⁶ Even though a *right*

read 'no law . . . abridging' to mean *no law abridging*"), but both allowed for some exceptions. *See also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (Black, J., dissenting) (rejecting symbolic speech claim by high school students suspended for wearing armbands to protest Vietnam War). Constitutional scholars also rarely advance absolutist arguments. *But see* Lyle Denniston, *Absolutism: Unadorned, and Without Apology*, 81 GEO. L.J. 351, 354–56 (1992) (proposing an absolute rejection of all limitations on expression, including laws and tort claims targeting libel, privacy, false advertising or obscenity, among others).

⁴⁵ Constitutions and statutes are not entirely disconnected; they are both sources of law used to maintain a certain social order and advance the public good. This invites the contention that the differences between them are merely structural and not substantive, and that the establishment of tiers of protection is not only an arbitrary exercise, but potentially anti-democratic in that the recognition of constitutional rights empowers the courts to override the public will. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962) (describing the "counter-majoritarian difficulty" presented by judicial review). The opposite framework is one in which constitutional rights in general and freedom of expression in particular are understood as "natural rights" or "moral rights" that supersede other social interests. *See, e.g.*, COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* 131 (1947) (describing free expression as a "moral right"); Universal Declaration of Human Rights, G.A. Res. 217A, at 74–75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (describing free expression as one of several "inalienable" rights central to people's "inherent dignity"). One need not subscribe to a natural-rights philosophy, however, to recognize that some interests are so foundational—whether to individual dignity or to the proper functioning of democracy—that they cannot be left fully exposed to the shifting whims of legislative bodies and therefore require more durable expression in the law.

⁴⁶ *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (2006)) (eliminating arbitrary barriers to the exercise of the franchise); Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (2006) (limiting the conditions under which law enforcement officials can search newsrooms). The latter act was a direct response to the Supreme Court's refusal to recognize a constitutional limitation on newsroom searches in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

does not exist until concretized by judicial ruling or constitutional amendment,⁴⁷ the underlying principles can still be advanced through statute.⁴⁸ In the constitutional context, however, arguments from policy are inapposite. Courts need not make judgments about the social good when construing constitutional rights, because the *good* has already been established.⁴⁹ Justice Hugo Black made a similar point when he noted that where "freedoms are left to depend upon a balance to be struck . . . in each particular case, liberty cannot survive. For under such a rule, there are no constitutional rights that cannot be 'balanced' away."⁵⁰ Black overstated his case; some balancing of interests is unavoidable in most constitutional adjudication.⁵¹ But that balancing must occur in the process of enforcing the right, not in determining whether it exists in the first place.

This shifting of assumptions is one of the central errors courts are making in reporter's privilege cases, and it is part of an insidious pattern in which instrumental (policy) arguments are eclipsing fundamental-rights (principle) arguments in *both* the constitutional and statutory settings, and in popular discourse as well. Those arguments treat the privilege as occasionally useful, perhaps, but not indispensable, and they tend to put forth a circumscribed version of the privilege that encompasses only its most politically salable protections. This is apparent in court rulings that

⁴⁷ Some natural-rights theorists might contend that certain rights are inherent and both precede and supersede the exercise of political power by civil governments; conversely, some legal positivists would reject the notion of individual rights altogether, or at least the existence of rights standing apart from people and the state. *Compare, e.g.,* H.L.A. HART, *THE CONCEPT OF LAW* (1961), *with* RONALD DWORKIN, *LAW'S EMPIRE* (1986). Nevertheless, the reality is that the American constitutional system *is* based on the recognition of enumerated rights, which establish presumptive—but not inviolable—limits on state power.

⁴⁸ Indeed, the legislative response to *Branzburg* and other cases denying a reporter's privilege ought to be regarded as attempts to give life to principles that some courts—through misinterpretation—have refused to recognize as elements of the First Amendment.

⁴⁹ The question in evaluating the Speech and Press Clauses of the First Amendment is not whether a particular component protection is important or useful; it is whether the component protection falls logically under the umbrella of the core protection.

⁵⁰ *Wilkinson v. United States*, 365 U.S. 399, 423 (1961) (Black, J., dissenting).

⁵¹ This is particularly true when the requirements of two constitutional rights are in conflict, as is often the case when journalists are subpoenaed in criminal cases. In those instances, judges have no choice but to consider both the Sixth and First Amendment interests. But they neglect the latter when they use the legal context to preemptively declare the privilege altogether inapplicable.

categorically exclude protections in certain types of proceedings⁵² or against subpoenas seeking certain types of information.⁵³ Instead of presuming that the protection exists and allowing the subpoenaing party to overcome it by pointing to some overriding condition, these courts use those conditions as justification for rejecting the baseline protection in the first place, often without any concomitant consideration of the harms that the subpoena presents to the news organization. The same thing is occurring in the legislative arena, where shield laws are loaded up with exceptions that allow the privilege to be invoked in only certain contexts.⁵⁴ So, not only are reporter's privilege protections usually *qualified*, in the sense that the shield can be overridden, they are *selective* in that their availability is situational. The former result is at least understandable in that no rights are absolute.⁵⁵ But the latter is irreconcilable with a principle-based, much less constitutionally rooted, conception of the privilege.⁵⁶

Despite the Supreme Court's ruling in *Branzburg v. Hayes*,⁵⁷ there is substantial theoretical support for recognition of a First Amendment reporter's privilege. Indeed, the Court drew from it when it acknowledged in *Branzburg* that "news gathering is not without its First Amendment protections"⁵⁸ and that "without some protection for seeking out the news, freedom of the press could be eviscerated."⁵⁹ By recognizing that the First Amendment goes beyond the protection of expressive freedom and also encompasses the pursuit and acquisition of information, the Court seemed to be working from a fundamental-rights model in which the press is

⁵² See, e.g., *Judith Miller Subpoena*, 397 F.3d 964, 972 (D.C. Cir. 2005) (finding *no* protection in criminal cases before grand juries, even in jurisdictions recognizing qualified First Amendment privilege in civil cases).

⁵³ See, e.g., *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (acknowledging the existence of a qualified First Amendment privilege for confidential source information but recognizing *no* protection for nonconfidential information).

⁵⁴ See, e.g., Free Flow of Information Act, H.R. 985, 111th Cong. § 2(d), (e) (2009) (the proposed House version of the Act does not allow the privilege to be claimed in defamation cases, § 2(d), or in situations in which the journalist witnessed criminal activity, § 2(e)); S. 448, 111th Cong. §§ 3(a), 5 (2009) (the Senate version also contains exceptions for observations of criminal activity and for issues related to national security).

⁵⁵ See *supra* note 44.

⁵⁶ To use a trite example, the fact that someone might shout fire in a theatre and cause a panic does not justify a government ban on speech in theatres. That is the problem with these judicial and legislative exceptions: they ignore the nuances of particular cases in the name of convenience, and are therefore prone to overbreadth.

⁵⁷ 408 U.S. 665 (1972); see also *supra* note 1.

⁵⁸ *Branzburg*, 408 U.S. at 707.

⁵⁹ *Id.* at 681.

autonomous from government and is endowed with a presumptive, though not unconditional, right to seek out the news. The Court went further by asserting that “liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher.”⁶⁰ This more “egalitarian”⁶¹ conception of the press is consistent with a fundamental-rights approach in suggesting that constitutional protections ought to be available to everyone equally.⁶² Nevertheless, the Court’s *resolution* of the case was based on policy concerns⁶³ and on its mischaracterization of the media litigants’ claims as demands for “special rights.”⁶⁴

Several of the essential elements of a First Amendment reporter’s privilege were clearly embraced by the Supreme Court in *Branzburg*, and some lower federal courts have built upon that foundation in recognizing some form of the privilege. Their approaches and rationales vary, however,

⁶⁰ *Id.* at 704. The Court added that “freedom of the press is a ‘fundamental personal right.’” *Id.* (quoting *Lovell v. Griffin*, 303 U.S. 444, 450 (1938)).

⁶¹ See Erik Ugland & Jennifer Henderson, *Who Is a Journalist and Why Does It Matter? Disentangling the Legal and Ethical Arguments*, 22 J. MASS MEDIA ETHICS 241, 246–47 (2007) (distinguishing an “egalitarian model” of the press in which “all citizens are equally equipped and equally free to serve as newsgathering watchdogs” from an “expert model” in which “journalists are conceived of as a uniquely qualified and clearly identifiable collection of professionals who serve as agents of the public in the procurement and dissemination of news.”).

⁶² This assumes that the person claiming the right was engaged in the behavior that the right was designed to protect—that is, the person was serving some “press” function. But this connection is necessary for the invocation of any constitutional right. The Sixth Amendment right to a fair trial, for example, is a right that every citizen is entitled to claim, even though only some people will ever have a need (by virtue of being charged with a federal crime) to assert it.

⁶³ The Court outlines an egalitarian conception of the press but then bemoans the “practical and conceptual difficulties” of enforcing such a privilege, given that it would require courts to “define those categories of newsmen who [would be] qualified” to claim its protections. *Branzburg*, 408 U.S. at 704. The Court seems to assume that the litigants were seeking some special definition of the press that would reserve these protections for only certain established news organizations. But if the Court had simply applied the egalitarian definition it outlined, there would have been no special rights problem.

⁶⁴ *Id.* at 683. The Court uses this language throughout its opinion: “[T]he publisher of a newspaper has no *special immunity* from the application of general laws. He has no *special privilege* to invade the rights and liberties of others.” *Id.* (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937) (emphasis added)). The Court added: “the First Amendment does not guarantee the press a constitutional right of *special access* to information not available to the public generally.” *Id.* at 684 (citing *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965)) (emphasis added).

and need to be more clearly anchored to principle.⁶⁵ A principle-based conception of the privilege must begin by treating the protection as a presumptive right that does not depend for its *recognition* on a balancing of interests, even if in the *application* of the right the protections occasionally must yield to competing needs. Similarly, the protection cannot be categorically withheld in certain types of cases or when only certain types of information are sought. A principle-based conception views the privilege as a bulwark against government encroachments on individuals' newsgathering and expressive autonomy—including, but not limited to, its confidential source relationships—not merely as a practical mechanism to foster anonymous speech,⁶⁶ much less certain types of speech. Every journalist subpoena therefore poses some risk, so it makes no sense to carve out wholesale exceptions and to deny judges the discretion to make case-specific determinations.⁶⁷

A principle-based conception of the privilege also requires application of an egalitarian definition of the press so that the prerequisites for claiming the privilege are focused on journalists' behaviors and expressive aims rather than on their credentials or institutional affiliations. Policy-based conceptions tend to focus on the qualifications or professional characteristics of claimants,⁶⁸ which leads to clumsy categorizations that are inappropriate when a "fundamental personal right"⁶⁹ is involved. That kind of rough ordering is the province of policymakers who are given wider latitude to

⁶⁵ See discussion of these cases *infra* Part III.

⁶⁶ This is perhaps a collateral benefit of recognizing the privilege, but it should not be treated as a substitute rationale.

⁶⁷ Indeed, the Court has rejected these categorical approaches in other First Amendment cases. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court struck down a state law mandating closure of courtrooms in rape trials in which minors would be testifying. The Court acknowledged the substantiality of the state's interest in protecting the privacy and well-being of minor witnesses, but because the rights of the press and public to observe these trials were "of a constitutional stature," the Court held that preemptive closure violated the First Amendment and that judges must have the discretion to weigh the countervailing interests on a case-by-case basis. *Id.* at 606–08.

⁶⁸ This might be acceptable if there was something about those qualifications that was inextricably linked to the distinguishing qualities of the underlying behavior. But in this context, anyone can serve a press function by seeking out and communicating information of public interest to a mass audience, whether or not their resumes bear the traditional markers of professionalism.

⁶⁹ *Branzburg*, 408 U.S. at 704 (citing *Lovell v. Griffin*, 303 U.S. 444, 450 (1938)). This is how the Court characterized the right to a free press in *Branzburg*, incorrectly assuming that the media litigants viewed their journalistic credentials as being relevant to their claim.

draw approximate boundaries in the name of efficiency. But when acting from principle, particularly when enforcing a constitutional right, there can be less allowance for imprecision.

Those opposed to recognition of a reporter's privilege often suggest to do so would be to bestow upon the press an affirmative right⁷⁰—or worse, a special right⁷¹—which the Court has refused to recognize in other First Amendment cases.⁷² They interpret the First Amendment as solely a shield against government limits on expression, not as a shield against restraints targeting non-expressive behavior. Scholars have long debated the extent to which the First Amendment protects newsgathering, including whether the Press Clause⁷³ and Speech Clause⁷⁴ have discrete constitutional meanings.⁷⁵ But under a principle-based conception of the privilege, that question is largely beside the point. That framework presupposes a connection between journalist subpoenas and expression—not in the indirect sense that without a privilege, journalists' sources will be less forthcoming, but in the direct sense that subpoenas can be used to harass and intimidate journalists, to interrupt

⁷⁰ See, e.g., Kara A. Larsen, Note, *The Demise of the First Amendment-Based Reporter's Privilege: Why This Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235, 1256 (2005) (suggesting that the Court has rejected affirmative rights of access for the press and that the Court in *Branzburg* rejected the journalists' pleas for special rights).

⁷¹ See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) ("We do not see why there need to be *special criteria* merely because the possessor of the documents or other evidence sought is a journalist.") (emphasis added); Michael Battle, Op-Ed., *No Special Privilege*, USA TODAY, June 22, 2006, at A12; Adam Liptak, *Courts Grow Increasingly Skeptical of Any Special Protections for the Press*, N.Y. TIMES, June 28, 2005, at A16.

⁷² See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (rejecting journalists' First Amendment-based claim for access to county jail where murder had occurred); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (rejecting journalists' First Amendment claim seeking access to inmates in federal prison); *Pell v. Procunier*, 417 U.S. 817, 834–35 (1974) (rejecting journalists' First Amendment challenge to the prison rule prohibiting inmate interviews).

⁷³ U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . .").

⁷⁴ *Id.* ("Congress shall make no law . . . abridging the freedom . . . of speech . . .").

⁷⁵ See, e.g., Stewart, *supra* note 43, at 633 (suggesting that the Press Clause is a structural provision that protects the autonomy of the institutional press). *But see* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) (rejecting the separate meaning of the two clauses and suggesting that the Press Clause is merely an extension of the Speech Clause's protection of expressive freedom).

their investigations, and to impair their standing as independent watchdogs.⁷⁶ The connection between subpoenas and journalists' speech is increasingly neglected in courts' analyses.

The principle-based conception of the privilege is a necessary framework in the First Amendment context, but it should not be abandoned in the statutory context either. Those who seek recognition of the privilege ought to work from the assumption that shield laws are merely alternative expressions of a broader principle and an attempt to supply protections that the courts have denied. The choice of frameworks is critical and will often determine the scope of the protections and the category of people entitled to claim them. Because of this, it *matters* how these cases are litigated and how the issues are framed. It also matters how they are presented in popular discourse, because policymakers, and occasionally judges, take actions that are either directly responsive to popular sentiment or at least mindful of the limits of public tolerances.⁷⁷

These are issues addressed more fully in Part IV. Part III, however, provides a portrait of the current state of the law and the shifts occurring in the judiciary by showing how courts are characterizing the privilege, what frameworks they are favoring, and how those choices are driving their conclusions. Broadly speaking, it is clear that the great period of reporter's privilege expansion that began after *Branzburg* ended in the late 1990s or early 2000s.

III. JUDICIAL RULINGS AND RATIONALES

In the three-plus decades since *Branzburg*, lower federal courts have forged their own idiosyncratic frameworks regarding the scope of the First Amendment and whether it protects reporters against subpoenas and other impairments of their newsgathering activity. Underlying their doctrinal differences are divergent conceptions of the central purposes of the First Amendment and whether it is merely a guarantor of expressive freedom or whether it also protects against less direct restraints that affect journalists' autonomy. The Court's indefinite decision in *Branzburg* (which the Court has

⁷⁶ It must also be emphasized that while most news organizations consider the "watchdog function" to be part of their core mission, the freedom to seek out, acquire, and disseminate information is a "fundamental personal right." *Branzburg*, 408 U.S. at 704 (quoting *Lovell v. Griffin*, 303 U.S. 444, 450 (1938)). The reporter's privilege, despite its unfortunate name, is therefore better understood as an individual right with a structural purpose.

⁷⁷ See *infra* Part III.

stubbornly refused to revisit⁷⁸) is the source of most of the uncertainties in this area of law. Not only was the Court divided with respect to the outcome in *Branzburg*, issuing what is often described as a 4.5-to-4.5 ruling, it gave almost no consideration to autonomy principles and how they might be threatened by subpoenas. The closest the Court came was a brief acknowledgement at the end of its opinion that subpoenas issued in bad-faith would present “wholly different issues.”⁷⁹ The Court saw no inherent problem with journalist subpoenas, however, and would presumably only reach a different conclusion where there was evidence of a deliberate plan to intimidate the press. But because that sort of evidence is almost impossible to discover, the Court’s brief caveat about harassment was a minor concession.

The Court’s opinion contains no consideration of the impact of subpoenas on either journalists’ expression—that is, their willingness to address controversial issues—or their actual or perceived independence from government or other powerful interests.⁸⁰ Instead, the Court dismissed the journalists’ claims as audacious demands for special rights,⁸¹ built around a “speculative”⁸² claim that sources would dry up in the absence of a privilege.⁸³ The Court even questioned the value of confidentiality, saying that many anonymous sources are self-interested subversives or scoundrels

⁷⁸ See, e.g., *Judith Miller Subpoena*, 397 F.3d 964 (D.C. Cir. 2005), *reh’g denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005); *In re Grand Jury Proceedings* (Scarce v. United States), 5 F.3d 397 (9th Cir. 1993), *cert. denied*, Scarce v. United States, 510 U.S. 1041 (1994); *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987), *aff’g* 652 F. Supp. 823 (S.D.N.Y. 1986), *cert. denied*, 481 U.S. 1015 (1987).

⁷⁹ *Branzburg*, 408 U.S. at 707. The Court added that “[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification.” *Id.* at 707–08.

⁸⁰ See *id.* at 725 (Stewart, J., dissenting). The dissenters addressed this squarely by noting, among things, that in the absence of some protection against subpoenas, officials could “annex the journalistic profession as an investigative arm of government.” *Id.*

⁸¹ See, e.g., *id.* at 683 (“The Court has emphasized that ‘[t]he publisher of a newspaper has no *special immunity* from the application of general laws. He has no *special privilege* to invade the rights and liberties of others.” (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937) (emphasis added))); *id.* at 682 (“The claim is, however, that reporters are exempt from these obligations This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a *privileged position* for them.” (emphasis added)); *id.* at 690 (“We are asked to . . . interpre[t] the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy.”).

⁸² *Id.* at 694. The Court does not explain why it is not equally “speculative” to suppose that sources would *not* dry up.

⁸³ *Id.* at 691. (“Nothing before us indicates that a large number or percentage of all confidential news sources . . . would in any way be deterred by our holding . . .”).

who do not deserve to have their identities concealed.⁸⁴ Finally, the Court set up a bogus contest between the press and law enforcement by suggesting that the “heart of the [press’] claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs *any* public interest in obtaining the information.”⁸⁵ But the press litigants never suggested that their interests were *transcendent*—only that they were *real* and that they ought to be acknowledged through some kind of balancing approach. Nevertheless, the Court, emphasizing the nature of the underlying proceeding (a grand jury inquiry),⁸⁶ resolved the issue categorically, permitting judges to entirely disregard the press’ interests, absent some evidence of a gross abuse of process.

In the decades since *Branzburg*, many lower federal courts have corrected some of the Court’s errors by limiting the *Branzburg* precedent to the grand jury context and recognizing a First Amendment or federal common law privilege in other contexts.⁸⁷ But there is no unanimity among the federal courts, much less the state courts. Some have refused to recognize a privilege altogether,⁸⁸ while others have recognized an incomplete version of it that limits the protection to particular types of information (*e.g.*, confidential but not nonconfidential),⁸⁹ proceedings (*e.g.*, civil but not criminal),⁹⁰ or claimants (*e.g.*, traditional but not non-traditional journalists).⁹¹ In each of these cases, much like in *Branzburg* itself, the results have been shaped by the alignment of the courts’ approaches with either the policy-instrumental or principle-autonomy conceptions of the

⁸⁴ *Id.* at 697 (“Neither are we now convinced that a virtually impenetrable constitutional shield . . . should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen’s justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates.”).

⁸⁵ *Branzburg*, 408 U.S. at 681 (emphasis added).

⁸⁶ *Id.*

⁸⁷ See *supra* note 8.

⁸⁸ See, *e.g.*, *Storer Commc’ns Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987).

⁸⁹ See, *e.g.*, *McKevitt v. Pallasch*, 339 F.3d 530, 532–33 (7th Cir. 2003).

⁹⁰ See, *e.g.*, *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998).

⁹¹ Overall, the federal courts have been more willing to embrace a broad definition of journalist than have the state courts or legislators drafting state shield laws. A typical contemporary definition is outlined in *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987), which requires that the person claiming the privilege had “the intent to use the material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process.” Other courts take a narrower view. See, *e.g.*, *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998) (reserving the protection to those engaged in “investigative reporting”).

privilege. The significance of these divisions has plainly been revealed in the past few years, as hundreds of journalists have been subpoenaed,⁹² dozens have been held in contempt, and several have spent time in jail for refusing to comply,⁹³ while Congress and the state legislatures continue to debate the necessity and scope of statutory protections.⁹⁴

A. Shifting Frameworks: A New Pathological Period

Perhaps the highest-profile reporter's privilege case since *Branzburg* was decided in 2005 by the D.C. Circuit Court. The case involved a First Amendment and federal common law challenge to subpoenas issued by special prosecutor Patrick Fitzgerald in the grand jury inquiry into illegal leaks at the White House. Fitzgerald wanted to know who leaked to the press that Valerie Plame Wilson was an undercover CIA agent.⁹⁵ Then-*New York Times* reporter Judith Miller and *Time* magazine reporter Matthew Cooper were two of several journalists subpoenaed by Fitzgerald to reveal the identities of their confidential sources. Both refused to comply and tried unsuccessfully to quash the subpoenas. After Federal District Court Judge Thomas F. Hogan rejected the reporters' requests for relief,⁹⁶ they appealed to the D.C. Circuit, which ruled unanimously against them.⁹⁷ Both Miller and Cooper were eventually ordered to prison for contempt, but Cooper avoided jail time after securing a waiver of his confidentiality agreement with the source, Vice President Dick Cheney's chief of staff, Lewis "Scooter" Libby. Miller also secured a waiver from Libby but only after spending 85 days in prison.⁹⁸

Despite the abundant divisions among the circuit courts on the reporter's privilege and on the meaning of *Branzburg*, the D.C. Circuit's opinion was less an exploration of core rationales than a fortification of *Branzburg* and an attempt to definitively end the ability of journalists to shield themselves against subpoenas, at least in the grand jury context. The court exalted

⁹² See Jones, *supra* note 18, at 643.

⁹³ See SHIELDS AND SUBPOENAS, *supra* note 27.

⁹⁴ See *supra* note 8; see also *infra* Part III.B.

⁹⁵ Many people have alleged that this was an orchestrated attempt to exact revenge against Valerie Wilson's husband, Joseph Wilson, who had criticized the Bush Administration's claims about Saddam Hussein's weapons programs. See Don Van Natta, Jr. et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1, available at <http://www.nytimes.com/2005/10/16/national/16leak.htm>.

⁹⁶ *In re Special Counsel Investigation*, 338 F. Supp. 2d 16, 19 (D.D.C. 2004).

⁹⁷ *Judith Miller Subpoena*, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005).

⁹⁸ See Van Natta et al., *supra* note 95, at A1.

Branzburg as if it were the lodestar of the free-press firmament, arguing that not only is its meaning “clear,”⁹⁹ but its conclusions are “absolute and unreversed.”¹⁰⁰ The D.C. Circuit simply glossed over *Branzburg*’s ambiguities, which have puzzled judges and legal scholars for decades and which have triggered the splits among the circuits.¹⁰¹ To do that, of course, the court had to first abate the nuisance of Justice Powell’s concurring opinion, which it conveniently characterized as a near-complete endorsement of Justice White’s opinion for the Court rather than a deliberate attempt by Powell to soften the Court’s definitive tone.¹⁰² The D.C. Circuit also ignored the divisions among the circuit courts, flatly declaring *Branzburg* to be “without doubt . . . the end of the matter.”¹⁰³ Finally, and most importantly, the D.C. Circuit made no effort to articulate either the instrumental or fundamental rights arguments that some courts have thoughtfully explored in crafting their approaches to the privilege. Indeed, Judge David Sentelle, who wrote the opinion for the D.C. Circuit, added a concurring opinion in which he warned of the troubles that would befall courts if they recognized a privilege: Would the privilege be absolute or qualified?¹⁰⁴ Would news take precedence over law enforcement?¹⁰⁵ Would journalists be immune from the obligation all citizens have to expose criminal wrongdoing?¹⁰⁶ Would amateur bloggers undermine the judicial process by exploiting the courts’ definitions of “journalist” and “the press”?¹⁰⁷ Sentelle implied that these issues were both new and insurmountable, even after acknowledging that

⁹⁹ *Judith Miller Subpoena*, 397 F.3d at 978; see also *id.* at 970 (“Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question.”).

¹⁰⁰ *Id.* at 970.

¹⁰¹ The court’s opinion is replete with conclusive characterizations of *Branzburg*’s meaning. It notes at the outset that there is “no material factual distinction” between *Branzburg* and the present case. *Id.* at 969. It adds that the Supreme Court “in no uncertain terms rejected the existence [of a reporter’s] privilege,” and that its reasoning was “transparent and forceful.” *Id.* at 969–70.

¹⁰² *Id.* at 971 (“Justice Powell’s concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice White’s reasoning on behalf of the majority.”).

¹⁰³ *Judith Miller Subpoena*, 397 F.3d at 970.

¹⁰⁴ *Id.* at 981.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

courts and legislatures have been dealing with them for decades.¹⁰⁸ Not only was Sentelle's conclusion (that *Branzburg* provides no relief to journalists in the grand jury context) questionable, but his opinion presents a challenge to the very idea of a reporter's privilege. In making that argument, he not only treated the logistical bothers as sufficient grounds for denying the privilege, but he also made no attempt—in either his concurrence or his opinion for the court—to confront the arguments that dozens of state and federal courts have embraced.

Judge David Tatel was the only one on the panel who made that effort, although it was in a concurring opinion, and he put most of his emphasis on the instrumental benefits of the privilege.¹⁰⁹ Tatel agreed with the other two justices on the disposition of the First Amendment claim,¹¹⁰ but he rejected the door-slamming absolutism of Sentelle's majority opinion and concurrence.¹¹¹ He also argued that while *Branzburg* provided the decisional rule with respect to Miller and Cooper, *Branzburg* was “not the end of the story”¹¹² and that “reason and experience” augur for recognition of a qualified privilege under federal common law.¹¹³ In making that case, Tatel provided a concise articulation of some of the rationales undergirding the privilege, stating that it is “obvious” that compelling a reporter to expose confidential sources presents “First Amendment problems”¹¹⁴ and that undue interference with those relationships would impair the press’ “constitutionally chosen” role of “keeping officials elected by the people responsible to all the people whom they were elected to serve.”¹¹⁵ In addition, it would create “chilling effects” by inhibiting the candor of sources and impairing “the press’s truth-seeking function.”¹¹⁶

¹⁰⁸ *Id.* at 979–81.

¹⁰⁹ *Judith Miller Subpoena*, 397 F.3d at 991–93 (Tatel, J., concurring).

¹¹⁰ Tatel wrote that because Miller and Cooper were similarly situated to the *Branzburg* plaintiffs, the court’s “hands are tied,” and *Branzburg* controls. *Id.* at 988.

¹¹¹ *Id.* at 987 (highlighting *Branzburg*’s “internal confusion” and the “enigmatic” concurrence of Justice Powell).

¹¹² *Id.* at 988.

¹¹³ *Id.* at 987–89 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996)).

¹¹⁴ *Id.* at 987 (quoting in part *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981)).

¹¹⁵ *Judith Miller Subpoena*, 397 F.3d at 991–92 (quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966)).

¹¹⁶ *Id.* at 991. Tatel added that under those circumstances, “[r]eporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner first-hand information about the criminal underworld.” *Id.*

The split between Tatel and Sentelle, which mirrors the broader divisions among the federal courts, was on display once again in an even more recent D.C. Circuit case, *Lee v. Department of Justice*,¹¹⁷ involving scientist Wen Ho Lee's Privacy Act suit against the FBI and the Departments of Energy and Defense. Lee alleged that government officials, in an effort to expose Lee as a Chinese spy, leaked private employment information to the press about Lee's work at the Los Alamos National Laboratory.¹¹⁸ Lee subpoenaed several reporters in order to learn the identity of those responsible for the leaks.¹¹⁹ The journalists challenged the subpoenas, but their motions to quash were rejected,¹²⁰ and the D.C. Circuit affirmed the denials.¹²¹

Judge Sentelle again wrote the opinion for the court, concluding that while *Lee* was different than *Branzburg* because it involved a civil claim rather than a grand jury inquiry, and while the court's prior ruling in *Zerilli v. Smith*¹²² required some balancing of interests, that balance nevertheless favored mandatory disclosure of the reporters' source information. Sentelle might have preferred not to recognize a privilege at all,¹²³ but under *Zerilli*, courts must ensure that subpoenas of non-party journalists (1) go "to the heart of the matter,"¹²⁴ and (2) are imposed only after the subpoenaing party has "exhausted every reasonable alternative source of information."¹²⁵ Once again, Sentelle offered no examination of the underlying rationales for those requirements and concluded that because Lee's suit depended on learning the identity of the leakers, the *Zerilli* test was clearly satisfied.¹²⁶

¹¹⁷ *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *reh'g denied*, 428 F.3d 299 (D.C. Cir. 2005).

¹¹⁸ Lee was indicted on 59 counts of espionage, but entered a plea agreement in which all of those charges were dropped except one relating to the mishandling of sensitive data. *Id.* at 55.

¹¹⁹ *Id.* at 56.

¹²⁰ *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005).

¹²¹ *Lee*, 413 F.3d at 56.

¹²² *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

¹²³ Judge Sentelle noted that "[n]ot only the breadth . . . but [the] very existence" of the reporter's privilege "has long been the subject of substantial controversy," *Lee*, 413 F.3d at 57, and that the Supreme Court in *Branzburg* "flatly rejected" the privilege and "expressly refused" to recognize it in the grand jury context. *Id.* He also seemed to be referring to himself when he added that "*some* would read the absolute language of the Supreme Court as foreclosing the possibility of any such privilege under any circumstance" *Id.* at 58 (emphasis added).

¹²⁴ *Zerilli*, 656 F.2d at 713 (internal quotations omitted).

¹²⁵ *Id.*

¹²⁶ *Lee*, 413 F.3d at 61.

After the ruling, the reporters sought review by the full circuit court, but the request was denied.¹²⁷ Judge Tatel, who criticized his colleagues' blunted interpretation of *Branzburg* in the Judith Miller case, dissented from the court's rehearing denial in *Lee*, filling in the substantive gaps left by the majority and exposing its inadequate accounting of the First Amendment interests at stake.¹²⁸ He acknowledged that the majority applied the required elements of *Zerilli* but said that the test itself is inadequate and does not really balance the "public and private interests."¹²⁹ Tatel pointed out that in leak cases, the elements of centrality and exhaustion will almost always be satisfied, yet there are situations in which the public interest in the leak outweighs the interests of the party seeking to discover the source.¹³⁰ The remedy, which Tatel spelled out in his earlier *Miller* concurrence, is that:

courts applying the privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, *the court must weigh the public interest in compelling*

¹²⁷ *Lee v. Dep't of Justice*, 428 F.3d 299, 300 (D.C. Cir. 2005).

¹²⁸ *Id.* at 301 (noting the public's "manifest interest in an unfettered press" and the risk of letting "trivial litigation . . . trump core First Amendment values."). Tatel also emphasized the value of press independence and how it "ensures that citizens are 'able to make informed political, social, and economic choices.'" *Id.* at 302 (quoting in part *Zerilli*, 656 F.2d at 711.).

¹²⁹ *Id.* at 301.

¹³⁰ *Id.* at 302 ("It's hard to imagine how [Lee's] interest could outweigh the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security."); see also *Judith Miller Subpoena*, 397 F.3d 964, 996–97 (D.C. Cir. 2005) (Tatel, J., concurring):

Of course, in some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships. For example, assuming Miller's prize-winning Osama bin Laden series caused no significant harm, I find it difficult to see how one could justify compelling her to disclose her sources, given the obvious benefit of alerting the public to then-underappreciated threats from al Qaeda. News reports about a recent budget controversy regarding a super-secret satellite program inspire another example [I]t seems hard to imagine how the harm in leaking generic descriptions of such a program could outweigh the benefit of informing the public about billions of dollars wasted on technology considered duplicative and unnecessary

*disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value.*¹³¹

Tatel's proposed public-interest balancing component is a sensible solution to some of the obvious limitations of the most widely used balancing criteria. And while it does raise its own set of complications by forcing courts to make subjective judgments about the relative value of particular stories and disclosures, there may be no other way to ensure that the First Amendment interests are adequately protected.¹³² Second Circuit Judge Robert Sack recently endorsed Tatel's approach, although in a dissenting opinion,¹³³ and the Senate's version of the proposed federal shield law contains a similar provision.¹³⁴ No recent court rulings, however, have added a public-interest component, and some have explicitly dismissed the idea.¹³⁵

One of those courts was the D.C. District Court, which refused to quash subpoenas issued to journalists as part of a Privacy Act claim filed by former Army scientist Stephen Hatfill.¹³⁶ Several news organizations had profiled Hatfill after he had been named "a person of interest" in the 2001 anthrax attacks in Washington, D.C. and New York City.¹³⁷ Hatfill, who claimed that anonymous government officials had leaked private information about him to reporters covering the investigation, subpoenaed dozens of reporters in the

¹³¹ *Judith Miller Subpoena*, 397 F.3d at 997–98 (Tatel, J., concurring) (emphasis added). Tatel ultimately concluded that Miller and Cooper's interests were outweighed by the government's need for their source information. But he noted that his conclusion would have been different if the leak had been "either less harmful or more newsworthy." *Id.* at 987.

¹³² Indeed, Tatel's balancing test does not go far enough in that it does not take full account of the impact of subpoenas on press autonomy. Whether or not these interests are explicitly made part of the balancing test, they ought to be among the extrinsic considerations that courts take into account when applying the balancing test. See discussion *infra* note 141 and accompanying text.

¹³³ See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 185–86 (2d Cir. 2007) (Sack, J., dissenting) [hereinafter *Islamic Charities*].

¹³⁴ Free Flow of Information Act, S. 448, 111th Cong. § 2(a)(3) (2009) (prohibiting federal courts from compelling discovery of journalists' information unless "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.").

¹³⁵ See *Islamic Charities*, 459 F.3d at 171–72; *Hatfill v. Gonzalez*, 505 F. Supp. 2d 33, 46 (D.D.C. 2007); *In re Grand Jury Subpoenas, Fainaru-Wada & Williams*, 438 F. Supp. 2d 1111, 1120 (N.D. Cal. 2006) [hereinafter *BALCO*].

¹³⁶ *Hatfill*, 505 F. Supp. 2d at 35–36.

¹³⁷ See *Judith Miller, Scientist Files Suit over Anthrax Inquiry*, N.Y. TIMES, Aug. 27, 2003, at A13.

case in order to learn the identity of the leakers. D.C. District Court Judge Reggie Walton refused to quash the subpoenas. Without engaging in any serious examination of the First Amendment implications of the subpoenas, Walton largely discounted the reporters' interests, insisting that confidential sources are not a "public good of transcendent importance"¹³⁸ and repeating the *Branzburg* canard that reporters who seek to protect their sources must believe "it is better to write about crime than to do something about it."¹³⁹ Walton added that "the protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is."¹⁴⁰ That is certainly true, but it is also beside the point. The journalists never questioned the public interest in enforcing the Privacy Act; they simply argued that that interest does not trump all others and that some attempt should be made to measure the value of enforcing the law against the collateral costs of that enforcement, which is what Judge Tatel's balancing formulation seeks to do.

Tatel's test is peculiar to leak cases, but it points to a broader problem, which is that courts' analyses typically focus on the interests and needs of the subpoenaing party while failing to adequately account for the First Amendment costs of forced disclosure. They assume that the creation of the balancing test itself provides a sufficient accommodation, often ignoring the specific admonitions of the courts that created the tests. The D.C. Circuit in *Zerilli*, for example, clearly intended that in working through elements of the test, courts should have their thumb on the journalists' side of the scale, and that in most cases the "litigant's interest in disclosure should yield to the journalist's privilege."¹⁴¹ These extrinsic considerations are supposed to inform the evaluative process but are often neglected in the courts' mechanical application of the explicit provisions.¹⁴² Without serious

¹³⁸ *Hatfill*, 505 F. Supp. 2d at 45 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996)).

¹³⁹ *Id.* at 36 (quoting *Branzburg*, 408 U.S. at 692).

¹⁴⁰ *Id.* at 37.

¹⁴¹ *Zerilli*, 656 F.2d at 712. *Zerilli* was involved in a civil case, but there is no reason to believe that the court's guidance would not apply to criminal cases as well, even though the *need* evaluation might be different.

¹⁴² The Supreme Court appeared to provide such a limitation when it noted in *Branzburg* that "[w]e do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg*, 408 U.S. at 708. The Court offered a similar proviso in *Zurcher v. Stanford Daily*, when it refused to recognize a First Amendment limit on newsroom searches but later acknowledged that the standard warrant requirements must be applied with "particular exactitude when First Amendment interests would be endangered by the search." 436 U.S. 547, 565 (1978). As a practical matter, however, these caveats have not provided journalists with additional protection.

consideration of the values at stake, however, the balancing process is a *fait accompli*.¹⁴³

What complicates this is that the interests of the journalists are often harder to define and measure than those of the subpoenaing party. In criminal cases, for example, the defendants often have a focused need for specific information that relates to an actual case before the court. The journalists' interests, on the other hand, are often *remote* in the sense that they relate to future consequences¹⁴⁴ or *abstract* in the sense that they are less demonstrable.¹⁴⁵ This is especially true when journalists defend themselves by using principle-based arguments, which are often accompanied by references to the watchdog function, autonomy, the Fourth Estate, and so on, all of which can be perceived by some as platitudinous. Principle-based arguments might be harder to articulate and substantiate, but they cannot be ignored if courts are to achieve "the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice."¹⁴⁶ Furthermore, the media litigants should not have to go to extraordinary lengths to make clear to courts what is at stake in these cases. Judges have a special obligation to identify the important constitutional issues that are affected, and, to the extent that any balancing is required, to look at the long-term consequences and not just the exigencies of the case at bar.¹⁴⁷

¹⁴³ Judge Merrick Garland made a similar point in his dissent to the rehearing denial in *Lee*, noting that if "the reporter's privilege is limited to those requirements [centrality and exhaustion], it is effectively no privilege at all." *Lee*, 428 F.3d at 302 (Garland, J., dissenting from denial of rehearing).

¹⁴⁴ The concern of many journalists is that surrendering their source information will impair their ability to work with and secure information from future sources. So, calculating all the harms associated with press subpoenas—at least those seeking source information—necessarily requires a degree of speculation on the part of the courts.

¹⁴⁵ To some extent the interests of journalists are linked to the broader public interest in media independence, which can be impaired in ways that are both real and symbolic. The latter is no less consequential; it diminishes the broader standing of the press and the public's confidence in its ability to serve as the public's proxy in monitoring powerful interests. But that symbolic consequence is not one that can readily be measured.

¹⁴⁶ DOJ Guidelines on Media Subpoenas, 28 C.F.R. § 50.10(a) (2006).

¹⁴⁷ See *Branzburg*, 408 U.S. at 736, n.19 (Stewart, J., dissenting):

It is the duty of courts to give legal significance to facts; and it is the special duty of this Court to understand the constitutional significance of facts. We must often proceed in a state of less than perfect knowledge, either because the facts are murky or the methodology used in obtaining the facts is open to question. It is then that we must look to the Constitution for the values that inform our presumptions.

Unfortunately, the less searching approach taken by the D.C. Circuit in *Miller* and *Lee*, and by Judge Walton in *Hatfill*, is increasingly familiar to journalists fighting subpoenas in federal courts, particularly in grand jury cases. Most of the recent cases in the federal circuits have involved either grand jury proceedings or investigations by special prosecutors, which are treated similarly,¹⁴⁸ and in every case the journalists have lost:

- In 2001, the Fifth Circuit refused to overturn a contempt order against freelance reporter Vanessa Leggett, who defied a grand jury subpoena seeking notes and recordings from interviews she conducted with two imprisoned murder suspects.¹⁴⁹ Leggett spent 168 days in jail.
- In 2004, the First Circuit let stand a contempt order against Rhode Island TV reporter James Taricani who had refused to respond to a grand jury subpoena issued in the investigation of the “Operation Plunder Dome” scandal in Providence.¹⁵⁰ Taricani was sentenced to six months of home confinement for refusing to divulge the source of a videotape showing a government official accepting a bribe.¹⁵¹
- In 2006, the Ninth Circuit refused to overturn a contempt order against video blogger Josh Wolf, who had challenged a grand jury subpoena seeking his testimony about, and video outtakes of, a violent protest in San Francisco.¹⁵² Wolf spent 226 days in jail—the longest sentence ever served by a journalist in a contempt case.¹⁵³
- Also in 2006, the Second Circuit overturned a district court ruling that had prohibited Special Prosecutor Patrick Fitzgerald from subpoenaing a telephone company for the phone records of *New York Times* reporters Judith

And the importance to our society of the full flow of information to the public has buttressed this Court's historic presumption in favor of First Amendment values.

¹⁴⁸ See *In re Special Proceedings*, James Taricani, 373 F.3d 37, 44–45 (1st Cir. 2004) [hereinafter *Taricani Proceedings*].

¹⁴⁹ *In re Grand Jury Subpoenas*, Vanessa Leggett, 29 Media L. Rep. (BNA) 2301 (5th Cir. 2001).

¹⁵⁰ *Taricani Proceedings*, 373 F.3d at 44–47.

¹⁵¹ Taricani had used portions of the videotape in an on-air report about the scandal.

¹⁵² *In re Grand Jury Subpoena*, Joshua Wolf, 201 F. App'x 430, 431, 434 (9th Cir. 2006).

¹⁵³ Vanessa Leggett was the previous holder of this dubious record.

Miller and Philip Shenon.¹⁵⁴ Fitzgerald wanted to know who tipped off the reporters about a planned government raid on an Islamic charity suspected of funding terrorists.¹⁵⁵ After the reporters refused to volunteer the information, Fitzgerald subpoenaed their phone records.

In addition to these circuit court decisions, most federal district courts have also taken a jaundiced view of privilege claims in grand jury cases. Perhaps the best known of these cases is the 2006 ruling against *San Francisco Chronicle* reporters Mark Fainaru-Wada and Lance Williams.¹⁵⁶ As part of their coverage of the grand jury investigation of the Bay Area Laboratory Cooperative (BALCO)¹⁵⁷—a pharmaceutical lab that secretly manufactured and distributed illegal steroids—the reporters published stories containing information from sealed transcripts that had been leaked to them by a confidential source.¹⁵⁸ The Justice Department subpoenaed the reporters to learn the identity of the leaker, and the reporters moved to quash. District Judge Jeffrey White rejected the motion, stating that *Branzburg* controls and that the Supreme Court's "holding is clear."¹⁵⁹ Nevertheless, even under the narrower view suggested by Justice Powell's concurrence,¹⁶⁰ the reporters were not entitled to any relief, Judge White held, because there was no abuse of the grand jury process and because learning the identity of the leaker was essential to determining whether that person had committed perjury or violated a protective order.¹⁶¹ Judge White also followed the lead of the

¹⁵⁴ *Islamic Charities*, 459 F.3d at 162–63.

¹⁵⁵ The *Times* published two stories about the government's investigation of the charity. See Judith Miller, *U.S. to Block Assets It Says Help Finance Hamas Killers*, N.Y. TIMES, Dec. 4, 2001, at A9; Philip Shenon, *A Nation Challenged: The Money Trail*, N.Y. TIMES, Dec. 15, 2001, at B6. The government claimed that these stories alerted the charity's leaders that they were being investigated, which effectively thwarted the government's plan to raid the charity and freeze its assets.

¹⁵⁶ *BALCO*, 438 F. Supp. 2d at 1111.

¹⁵⁷ BALCO owner Victor Conte was eventually charged and convicted of various federal crimes. Several others have been convicted or charged as well, and the BALCO grand jury investigation is still ongoing after more than four years. See Nathaniel Vinton, *Is This the End of BALCO?*, N.Y. DAILY NEWS, Mar. 1, 2009, at 72.

¹⁵⁸ The source, defense attorney Troy Ellerman, eventually came forward and admitted that he had supplied the information to the reporters. This negated the need for the reporters' testimony and the subpoenas were withdrawn. Ellerman, however, was punished for contempt. See Teri Thompson, *No Deal! Judge Shocks BALCO Leaker*, N.Y. DAILY NEWS, June 15, 2007, at 88.

¹⁵⁹ *BALCO*, 438 F. Supp. 2d at 1117.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1118.

recent circuit cases by refusing to recognize a federal common law privilege, adding that even if one applied, it had been overcome by the government.¹⁶²

The rejection of the reporters' First Amendment claims in these cases was not entirely unexpected. The courts were hemmed in by *Branzburg*, which, even when read through the lens of Powell's concurrence, provides only limited support for recognition of constitutional protections against grand jury subpoenas. These courts went too far, however, by essentially arguing against the need for *any* serious First Amendment scrutiny of grand jury subpoenas and suggesting—explicitly and implicitly—that such protections ought to be denied to reporters in other types of proceedings as well.

The recent grand jury cases are remarkable for several other reasons. One is that while the courts carefully articulated “the needs of law enforcement,”¹⁶³ they provided no examination of the autonomy principles that support the privilege,¹⁶⁴ nor any acknowledgement of the risks posed by journalist subpoenas. Indeed, some of these courts explicitly rejected any empirical connection between effective journalism and protection against subpoenas.¹⁶⁵ The courts expressed no sympathy for the journalists, nor were the courts' applications of *Branzburg* in any way grudging. Like Judge Sentelle in *Miller* and *Lee*, these courts exalted *Branzburg*, presenting it as an unqualified and unambiguous renunciation of the privilege,¹⁶⁶ tersely rejecting any claim that the First Amendment has a significant role to play in

¹⁶² Judge White followed the three-part test articulated in *Shoen v. Shoen (Shoen II)*, 48 F.3d 412, 416 (9th Cir. 1995), which requires the subpoenaing party to show that the information is “(1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case.” Judge White concluded with little elaboration that the government had satisfied these requirements. *BALCO*, 438 F. Supp. 2d at 1120.

¹⁶³ *Islamic Charities*, 459 F.3d at 185.

¹⁶⁴ Judge White's opinion in *BALCO* did offer some prefatory acknowledgement of the importance of a free press and noted that the ability to promise confidentiality to sources is “essential in assisting the press in” its task of “informing the citizenry [about] public events and occurrences.” *BALCO*, 438 F. Supp. 2d at 1114–15 (quoting in part *Estes v. Texas*, 381 U.S. 532, 539 (1965)). But that was the full extent of it.

¹⁶⁵ See, e.g., *Taricani Proceedings*, 373 F.3d at 44 (pointing to the doubt expressed by the *Branzburg* Court about the harms that subpoenas posed to newsgathering). Interestingly, none of these recent federal decisions notes the *Branzburg* Court's acknowledgment that “news gathering is not without its First Amendment protections,” *Branzburg*, 408 U.S. at 707, and that “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.* at 681.

¹⁶⁶ Most did acknowledge that harassment or bad faith would be a problem, but that is simply what *Branzburg* requires. *Branzburg*, 408 U.S. at 707.

these contexts, and refusing to seriously consider recognition of a federal common law privilege.

The starkest example of this was Judge Richard Posner's 2003 opinion for the Seventh Circuit in *McKevitt v. Pallasch*,¹⁶⁷ which some believe was the decision that triggered the recent reevaluation of *Branzburg* by other federal courts, although the backslide probably started earlier.¹⁶⁸ In *McKevitt*, the court refused to stay a district court order compelling three reporters to turn over tape recordings of interviews they had conducted with a key witness in the Irish criminal trial of an alleged terrorist.¹⁶⁹ This was a non-grand-jury case involving nonconfidential information, so its facts were distinguishable from *Branzburg*. Nevertheless, Judge Posner and his colleagues on the panel interpreted *Branzburg* as an almost unqualified rejection of the privilege, which was unaffected by the procedural or substantive context. The court also read Powell's concurrence as essentially no limitation at all, concluding that Powell's concerns about subpoenas being used to impair journalists' "First Amendment freedoms"¹⁷⁰ could be ameliorated by the application of a "reasonable in the circumstances" test.¹⁷¹ But those "circumstances" would not require the application of heightened scrutiny, because, the court explained, the reasonableness test was the same one applied to all federal subpoenas under the Federal Rules of Criminal Procedure.¹⁷² Posner hammered home the point by stating, "We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist."¹⁷³ Perhaps Powell would agree about the need for special criteria, but he surely did not expect existing criteria to be applied identically to both journalists and non-journalists or it would have been unnecessary for him to write separately.¹⁷⁴ The Seventh

¹⁶⁷ *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

¹⁶⁸ See *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998).

¹⁶⁹ *McKevitt*, 339 F.3d at 535. The subject of the interviews was David Rupert, who was expected to testify against Michael McKevitt. McKevitt was on trial in Ireland for organizing terrorist activities and for being a member of a banned group. *Id.* The reporters were working on a biography of Rupert, which was the impetus for the interviews. *Id.*

¹⁷⁰ *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

¹⁷¹ *McKevitt*, 339 F.3d at 533.

¹⁷² *Id.* (citing FED. R. CRIM. P. 17(c), as interpreted by *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 993 (7th Cir. 2002)).

¹⁷³ *Id.* Posner could be accused of contradicting himself by dismissing the need for special protections while at the same time establishing a test that would take account of the First Amendment interests at stake.

¹⁷⁴ Powell's suggestion that courts evaluate journalist subpoenas on a case-by-case basis was clearly made in recognition of the unique and constitutionally significant risks

Circuit's *McKevitt* opinion, however, is devoid of anything that would suggest a changed application of the normal criteria. The court did not seriously examine the First Amendment concerns,¹⁷⁵ it explicitly rejected the autonomy arguments emphasized by other courts,¹⁷⁶ it discounted the connection between the subpoenas and the speech of the journalists,¹⁷⁷ and it essentially recast the journalists' interests as being about the protection of their intellectual property rather than about either their autonomy or expression.¹⁷⁸

The federal courts' drawback on the reporter's privilege is not limited to the peculiar context of grand jury proceedings. Some courts have begun to re-read *Branzburg* in other criminal cases as well. These contextual issues are described more fully in Part IV.C, but the most striking example is *United States v. Smith*.¹⁷⁹ In *Smith*, a television reporter sought to quash a subpoena seeking outtakes of an interview with a criminal defendant in an arson case.¹⁸⁰ The Fifth Circuit overturned the district court's decision to quash the subpoena,¹⁸¹ reading *Branzburg* (as limited by Powell's concurrence) as only prohibiting subpoenas that amount to harassment of the press.¹⁸² "In the end," the Court held, "Justice Powell's concurrence highlighted a limit on the

that those subpoenas pose—something the *Branzburg* majority even seemed to accept when it said, "We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg*, 408 U.S. at 708.

¹⁷⁵ Although the court acknowledged that "newsgathering and reporting activities of the press are inhibited when a reporter cannot assure a confidential source of confidentiality," it did not elaborate except to note that confidentiality was considered by the *Branzburg* Court to be insufficient grounds for quashing a grand jury subpoena. *McKevitt*, 339 F.3d at 532.

¹⁷⁶ *Id.* at 533; see also discussion *infra* Part III.B.

¹⁷⁷ Posner did this by suggesting that the journalists' sole *speech* interest was in publishing their planned biography. *McKevitt*, 339 F.3d at 535 ("No showing has been made, or would be plausible, that the reporters will have to abandon the Rupert biography if the information contained in the recordings of their interviews with him is made public.").

¹⁷⁸ *Id.* at 533–35. Posner suggests that the journalists' real concern was in preventing *McKevitt* from appropriating the recorded interviews, which would reduce their value. *Id.* at 533–34.

¹⁷⁹ *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998).

¹⁸⁰ *Id.* at 967.

¹⁸¹ *United States v. Smith*, No. 96-117, 1996 WL 371702 (E.D. La. July 2, 1996).

¹⁸² *Smith*, 135 F.3d at 969. ("Justice Powell's separate writing only emphasizes that at a certain point, the First Amendment must protect the press from government intrusion.").

government's subpoena power also recognized by the plurality opinion."¹⁸³ The Fifth Circuit essentially interpreted Powell's concurrence as a redundancy by suggesting that it only reiterated a point made in the opinion of the Court.¹⁸⁴ The Fifth Circuit rejected recognition of any broader privilege in the criminal context and, in dicta, largely rejected the privilege altogether, not only by reading *Branzburg* narrowly but by dismissing the core autonomy concerns expressed by the media litigants as "speculative at best."¹⁸⁵

All of these federal reporter's privilege cases, beginning roughly with *Smith* and *Leggett* and continuing today, could mark the beginning of a realignment of the reporter's privilege and perhaps an even broader First Amendment retrenchment. Because most of these cases involved grand juries, leaks, or both, the outcomes are not particularly alarming. The courts' rationales and assumptions, however, suggest both a reinterpretation of *Branzburg* and reconceptualization of the privilege. At the core of these changes is a shift away from the kind of autonomy- and principle-based arguments that have provided much of the privilege's theoretical footing over the past two decades. These courts' analyses dismiss the connection between subpoenas and journalists' expression,¹⁸⁶ they treat the privilege as solely a newsgathering matter—and in so doing, remove it from the First Amendment's core protections—and they only partly and perfunctorily identify the longer-term harms and social-structural hazards of denying protection. The First Amendment, in short, is largely inconsequential to both the scope and application of the limited protections recognized in these recent opinions, which, like many recent cases in the lower federal and state courts, treat the privilege more like a gratuitous obstruction than a vital constitutional right.¹⁸⁷

¹⁸³ *Id.*

¹⁸⁴ *Branzburg*, 408 U.S. at 709.

¹⁸⁵ *Smith*, 135 F.3d at 970.

¹⁸⁶ One aspect of the D.C. Circuit's rehearing denial in *Lee* that was not addressed by the dissenters but that provides another example of the court's constricted view of the First Amendment issues at stake was its evaluation of the standard of review. Under the Supreme Court's ruling in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), courts are required to independently examine the trial court record in cases "raising First Amendment issues." *Id.* at 499. The D.C. Circuit held that this limitation did not apply in *Lee* because the discovery order did not interfere with the "journalists' right to print or communicate anything they choose." *Lee*, 413 F.3d at 58.

¹⁸⁷ This is not to say that these judges have no respect for the First Amendment; only that they have, as Justice Stewart put it in his *Branzburg* dissent, "a crabbed view of [it]" that undervalues "the critical role of an independent press in our society." 408 U.S. at 725 (Stewart, J., dissenting).

The remainder of Part III will examine some specific aspects of the reporter's privilege and how they are affected by the courts' emphasis on policy-based arguments. It will also draw upon some of the earlier cases to provide a fuller picture of existing precedent and a sense of the trajectory across the federal circuits.

B. Substantive Context: Confidential v. Nonconfidential

The division between policy-based and principle-based conceptions of the reporter's privilege is no more conspicuous than in courts' handling of subpoenas for confidential versus nonconfidential information. Since *Branzburg*—and, in fact, decades prior to that case¹⁸⁸—the privilege has been presented as a mechanism for preserving the privacy of interactions between reporters and their sources. Courts have often borrowed from the general law of privilege, drawing parallels between reporter-source protections and longstanding protections for clergy-congregant, attorney-client, husband-wife, and doctor-patient relationships.¹⁸⁹ All of these privileges serve similar ends by preserving the confidentiality of the parties so that they can be uninhibited in their communications with one another. The reporter's privilege is different, however, in that its purposes extend beyond the “parochial personal concerns of particular newsmen or informants”¹⁹⁰ to the broader societal need for a free flow of information about public issues.¹⁹¹ The reporter's privilege is also uniquely rooted in the Constitution and is tied to the core principles and structural arrangements of American democracy. Judges and lawmakers who equate the reporter's

¹⁸⁸ The first time a journalist used the First Amendment as the basis for refusing to comply with a subpoena was in *Garland v. Torre*, 259 F.2d 545, 551 (2d Cir. 1958) (refusing to overturn contempt order against journalist who refused to divulge confidential source information in a libel suit brought by actress Judy Garland against CBS). Reporters have relied on confidential sources since the earliest days of news reporting. Most essays and political tracts in colonial papers were published under pseudonyms, and there were many instances in which printers defied orders by colonial governors to reveal the identities of the anonymous contributors. See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 189–90 (1985).

¹⁸⁹ Each of these parties is generally free of any obligation to testify against the other, although with various exceptions. See generally KENNETH S. BROWN, *MCCORMICK ON EVIDENCE* (6th ed. 2009) (outlining the general rules under statute and common law for testimonial privileges related to “Marital Communications,” §§ 78–86, “Client and Lawyer,” §§ 87–97, and “Physician-Patient,” §§ 98–105).

¹⁹⁰ *Branzburg*, 408 U.S. at 726 n.2 (Stewart, J., dissenting).

¹⁹¹ Even if one does not believe that the First Amendment compels recognition of the reporter's privilege, it still bears a linkage to constitutional principles, which is not true of most other privileges.

privilege with other privileges usually overlook these features and tend to engage in pro-con policymaking calculations that neglect these macro-level features.

In the 1980s and 1990s, when many federal courts began to look past the four-vote opinion of the Court in *Branzburg* and recognize some First Amendment protections for reporters, those courts paid more attention to these principle-constitutional arguments and the *social* interests served by *individual* autonomy. In *United States v. Cuthbertson*,¹⁹² for example, the Third Circuit overturned a contempt order against CBS after it refused to comply with subpoenas seeking tapes and transcripts of dozens of interviews that had been conducted by reporters for its *60 Minutes* program.¹⁹³ The court held that a qualified reporter's privilege applied even though the identities of the interviewees were not confidential. "We do not think that the privilege can be limited solely to protection of sources," the court wrote, because "[t]he compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes."¹⁹⁴ The court added that it is senseless to differentiate between confidential-source subpoenas and subpoenas for nonconfidential information, because both are capable of impairing the "free flow of information to the public that is the foundation for the privilege."¹⁹⁵ This was clearly an argument from principle. The court did not condition recognition of the privilege on the preservation of source anonymity and instead treated press autonomy as the orienting value. Because autonomy is sacrificed to some extent by all subpoenas, it is unacceptable to carve out content-related categories, even though doing so might be a reasonable shortcut in the public policy context.

The First Circuit employed a similar framework in 1988 in *United States v. LaRouche Campaign*,¹⁹⁶ which involved a press subpoena issued in the criminal trial of presidential candidate Lyndon H. LaRouche.¹⁹⁷ The First Circuit upheld a contempt order against NBC for refusing to submit for *in camera* review outtakes of its interview with a prospective witness. Nevertheless, the court recognized that the First Amendment reporter's privilege, even if qualified, is not blind to the dangers posed by subpoenas for nonconfidential information. "We discern a lurking and subtle threat to

¹⁹² *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

¹⁹³ The interviews were conducted by *60 Minutes* reporters as part of their investigation of a restaurant chain whose owners were later indicted. *Id.* at 142.

¹⁹⁴ *Id.* at 147.

¹⁹⁵ *Id.*

¹⁹⁶ *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988).

¹⁹⁷ *Id.* at 1177.

journalists and their employers,” the court held, “if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled.”¹⁹⁸ The court also explicitly embraced the arguments made by NBC lawyers supporting the extension of the privilege to nonconfidential information, which included:

‘the threat of administrative and judicial intrusion’ into the newsgathering and editorial process; the disadvantage of a journalist appearing to be ‘an investigative arm of the judicial system’ or a research tool of government or of a private party; the disincentive to ‘compile and preserve nonbroadcast material’; and the burden on journalists’ time and resources in responding to subpoenas.¹⁹⁹

These were among the arguments expressed by Justice Stewart in his *Branzburg* dissent,²⁰⁰ and they had become, until recently, a common feature of federal and state court opinions in privilege cases. In 1993, in *Shoen v. Shoen*, the Ninth Circuit overturned a district court’s contempt order against an investigative book author who refused to turn over notes and transcripts of interviews he had conducted with the defendant in a defamation case.²⁰¹ The court noted at the outset that the reporter’s privilege is “[r]ooted in the First Amendment” and is a recognition of “society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public.”²⁰² On the question of the privilege’s applicability to nonconfidential information, the court noted with approval each of the key justifications outlined by the First Circuit in *LaRouche* and embraced by other federal circuits.²⁰³ It also highlighted some related arguments from legal scholars,²⁰⁴ concluding that “this body of circuit case law and scholarly authority [is] so persuasive that we think it unnecessary to discuss the

¹⁹⁸ *Id.* at 1182.

¹⁹⁹ *Id.* (quoting in part, without attribution, the arguments of NBC).

²⁰⁰ *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting). Although Stewart did not address the distinction between confidential-source subpoenas and others subpoenas, he clearly highlighted the social-structural dangers posed by all press subpoenas, noting, for example, that without some protection against subpoenas, “state and federal authorities [could] undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government.” *Id.*

²⁰¹ *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

²⁰² *Id.* at 1292.

²⁰³ *Id.* at 1294–95.

²⁰⁴ *Id.* at 1295.

question further.”²⁰⁵ Unfortunately, in the more recent case involving Josh Wolf, the Ninth Circuit took into account the nonconfidential nature of the materials sought in a grand jury case, saying, “[n]one of the authorities cited by either Wolf or the *amici* requires the district court to conduct a balancing test where, as here, there is no showing of bad faith and the journalist refuses to produce non-confidential material depicting public events.”²⁰⁶ The Ninth Circuit’s *Wolf* opinion does not mention *Shoen*.

In 1999, the Second Circuit weighed in with a decision that offered a thorough examination of the relevance of confidentiality to the recognition and application of the privilege. In *Gonzales v. National Broadcasting Company*,²⁰⁷ the court upheld a contempt order against NBC, which had refused to turn over and testify about nonbroadcast footage from a “Dateline” investigation about unwarranted police traffic stops. But in doing so the court made clear that the reporter’s privilege applies to *both* confidential and nonconfidential information and that subpoenas focused on the latter ought to be subjected to a balancing test²⁰⁸ similar to the one that the Second Circuit applies to confidential source subpoenas.²⁰⁹ The court noted that the broader purpose of the privilege is to protect the “paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.”²¹⁰ That interest is not *uniquely* jeopardized by confidential-source subpoenas, so, as

²⁰⁵ *Id.* (“Accordingly, we hold that the journalist’s privilege applies to a journalist’s resource materials even in the absence of the element of confidentiality.”).

²⁰⁶ *In re Grand Jury Subpoena*, Joshua Wolf, 201 F. App’x 430, 432 (9th Cir. 2006).

²⁰⁷ *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999) (*Gonzales II*). The court’s ruling was actually an amended opinion to an earlier decision in which the court flatly rejected any privilege for nonconfidential information. *Gonzales v. NBC*, 155 F.3d 618 (2d Cir. 1998) (*Gonzales I*). In *Gonzales I*, the court not only dismissed NBC’s claim that its reporters’ ability to gather information could be undermined by forced disclosure of nonconfidential information, it noted that the added scrutiny of journalists’ editorial process might be a good thing that could “make the final news product more complete, accurate and reliable.” *Id.* at 624.

²⁰⁸ The court held that “[w]here a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery . . . if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.” *Gonzales II*, 194 F.3d at 36.

²⁰⁹ The court noted that compliance with confidential-source subpoenas can only be compelled “upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.” *Id.* at 33 (quoting *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982)).

²¹⁰ *Id.* at 33 (quoting *Baker v. F. & F. Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)).

the court noted, there is no need for a strict division in which nonconfidential subpoenas are entirely outside the scope of the privilege.²¹¹ In *Gonzales II*, the Second Circuit echoed many of the arguments made by the courts in *Shoen*,²¹² *LaRouche*,²¹³ and *Cuthbertson*,²¹⁴ all of which were reflective of a principle-based conception of the privilege,²¹⁵ even though the *Gonzales II* court based its decision on federal common law rather than the First Amendment.²¹⁶

During the 1980s and 1990s, none of the other federal circuit courts directly addressed the nonconfidential question, but there were favorable district court decisions in nearly every one of those circuits.²¹⁷ What emerged

²¹¹ Nevertheless, the court held that journalists' interests in cases involving nonconfidential subpoenas are "narrower" and ought to be more "easily overcome" than in cases involving confidential-source subpoenas. *Id.* at 36. As a result, the test established by the court in *Gonzales* is "less demanding" in the former context than in the latter. *Id.*

²¹² 5 F.3d 1289, 1292 (9th Cir. 1993).

²¹³ 841 F.2d 1176, 1182 (1st Cir. 1988).

²¹⁴ 630 F.2d 139, 147 (3d Cir. 1980).

²¹⁵ The court appeared to recognize protection for nonconfidential information in *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) ("unpublished resource material likewise may be protected") and arguably in *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 at 7, but in *Gonzales II* the court was more explicit and provided a more complete elucidation of the underlying rationales:

If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties—particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.

194 F.3d at 35.

²¹⁶ Although this is often regarded as a positive decision for the press because the court acknowledged the need to protect nonconfidential information, it was to some extent a step backward in that prior to *Gonzales II*, the Second Circuit had applied the stronger of the two tests to both confidential and nonconfidential information. *See United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983).

²¹⁷ In the Fourth Circuit, *see Stickels v. Gen. Rental Co.*, 750 F. Supp. 729, 732 (E.D. Va. 1990); in the Fifth Circuit, *see Brinston v. Dunn*, 919 F. Supp. 240, 242–43 (S.D. Miss. 1996); in the Eighth Circuit, *see Cont'l Cablevision, Inc. v. Storer Broad.*

was a strong majority view among the federal courts that there is a First Amendment—or, at the very least, a common law—basis for recognizing a qualified reporter's privilege, and that this privilege extends to both confidential and nonconfidential information. The pattern was similar in many state courts.²¹⁸ This began to change in earnest in the very late 1990s and early 2000s, when some district courts began retreating on the privilege and scaling back protections for nonconfidential information, by either adopting weaker standards or applying them less demandingly.

One case that stands out as a marker between the period of reporter's privilege expansion and the more recent "pathological" period is the Fifth Circuit's 1998 opinion in *United States v. Smith*.²¹⁹ In that case, the Court reversed the district court's decision to quash a subpoena²²⁰ for nonconfidential information in a non-grand-jury criminal case. The Court read *Branzburg* as a full-throated rejection of the privilege.²²¹ It also dismissed all of the arguments made by the media litigants—which several other federal circuit courts had embraced, and which the Fifth Circuit itself had accepted 18 years earlier²²²—but without an explanation. The court simply concluded that the idea of sources drying up as a result of excessive press subpoenas was "speculative"²²³ and dismissed out of hand any prospect of a chilling effect resulting from a perceived "unholy alliance" between the

Co., 583 F. Supp. 427, 433 (E.D. Miss. 1984); in the Eleventh Circuit, see *Kidwell v. McCutcheon*, 962 F. Supp. 1477, 1480 (S.D. Fla. 1996); and in the D.C. Circuit, see *Maughan v. NL Indus.*, 524 F. Supp. 93, 94–95 (D.D.C. 1981). The Sixth Circuit has not addressed the issue, nor have its district courts, but the Sixth Circuit rejected the privilege altogether in *Storer Communications Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987). There were no favorable rulings in the Seventh or Tenth Circuits during this period, although there have been some recently. In the Seventh Circuit, see *Bond v. Utreras*, No. 04 (C 2617), 2006 WL 1806387, at *2 (N.D. Ill. June 27, 2006); and in the Tenth Circuit, see *United States v. Foote*, No. 00-CR-20091-01-KHV, 2002 WL 1822407, at *6 (D. Kan. Aug. 8, 2002).

²¹⁸ See, e.g., *Kurzynski v. Spaeth*, 538 N.W.2d 554, 557–59 (Wis. Ct. App. 1995); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188, 193 (W. Va. 1990); *Austin v. Memphis Publ'g Co.*, 655 S.W.2d 146, 149–50 (Tenn. 1983).

²¹⁹ 135 F.3d 963, 971–72 (5th Cir. 1998).

²²⁰ *United States v. Smith*, No. 96-117, 1996 WL 371702, at *2 (E.D. La. July 2, 1996).

²²¹ The court argued that *Branzburg* rejected the notion of a privilege even in the context of a confidential-source subpoena, so it would make no sense to recognize protections in situations where the reporters' interests were even less compelling. *Smith*, 135 F.3d at 970.

²²² *Miller v. Transamerica Press*, 621 F.2d 721, 727 (5th Cir. 1980).

²²³ *Smith*, 135 F.3d at 970.

press and government.²²⁴ The court obliterated the core argument for *constitutional* protection by insisting that the press “is not differently situated from any other business that may find itself possessing evidence relevant to a criminal trial.”²²⁵ Of course, what differentiates the press is the First Amendment, and while the court’s conclusion would be defensible if the media litigants had sought to reserve the privilege for particular types of news organizations,²²⁶ it is unlikely that they had such intentions, and even if they did, it should not have prevented the court from elucidating a properly circumscribed privilege built around a more egalitarian conception of the press.²²⁷

Five years after *Smith*, the Seventh Circuit accelerated the pullback on nonconfidential source protection with its decision in *McKevitt*.²²⁸ Judge Posner’s opinion in that case was even more stark and dismissive than the Fifth Circuit’s *Smith* ruling.²²⁹ In *McKevitt*, the Seventh Circuit disputed the constitutional basis for any form of the privilege, describing as “rather surprising”²³⁰ the rulings of those federal circuits that had recognized First Amendment protections. Even after listing all of the circuit rulings supporting protection for nonconfidential information, and noting that those courts had “express[ed] concern with harassment, burden, [and] using the press as an investigative arm of government,”²³¹ the court summarily dismissed those concerns as if they were self-evidently illegitimate.

Although the court conceded that sources might be less forthcoming if reporters were unable to promise confidentiality, it essentially held that *Branzburg*’s rejection of the *greater* interest in protecting confidential information included a rejection of the *lesser* interest in protecting nonconfidential information.²³² The *McKevitt* court went beyond merely complying with what it believed was mandatory authority, however. It

²²⁴ *Id.* Of course, the real problem with such a perception is not the risk of a chilling effect but the diminution of the press’ credibility—and perceptions of its independence and trustworthiness—in the eyes of the public.

²²⁵ *Id.*

²²⁶ Perhaps that is what the Court assumed when it criticized the media’s reference to the protection as an “‘institutional’ privilege.” *Id.* at 969.

²²⁷ See Ugland & Henderson, *supra* note 61.

²²⁸ 339 F.3d 530, 534–35 (7th Cir. 2003).

²²⁹ Indeed, Posner criticized the *Smith* court’s characterization of *Branzburg* as a plurality. *Id.* at 532.

²³⁰ *Id.*

²³¹ *Id.* at 533.

²³² *Id.* at 532. This assumes, of course, that the entire opinion of the Court in *Branzburg* was a majority opinion rather than (at least in part) a plurality.

rejected entirely the value of protecting nonconfidential information²³³ and went so far as to suggest that compelling the reporters to disclose their interview tapes and transcripts would *enhance* the First Amendment, which is served by “publication rather than secrecy.”²³⁴ That specious bit of reasoning provides an example of the practice described earlier in which judges weigh the interests on both sides with only the shortest-term and most readily measurable consequences in mind.²³⁵

In the past decade, several federal district courts²³⁶ and state courts²³⁷ have issued similarly narrow rulings on nonconfidential information, sometimes in direct response to *Smith* and *McKevitt*,²³⁸ and often in contradiction of their own earlier opinions issued during the period of reporter’s privilege expansion.²³⁹ Reflected in those opinions is a set of policy-based arguments and assumptions. One of these is that the media litigants in reporter’s privilege cases are similarly situated to all other possessors of relevant evidence. That argument makes the most sense coming from judges who seek to deny recognition of the reporter’s privilege altogether—those whose theory of the First Amendment is exclusively focused on expressive freedom, for example. But that view misses the

²³³ *Id.* at 533 (“[I]t is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure” of nonconfidential information.).

²³⁴ *McKevitt*, 339 F.3d at 533. The Court suggested that “the parties to this case are reversed from the perspective of freedom of the press” because the journalists were asserting a right to prevent disclosure of information. *Id.*

²³⁵ See *supra* notes 144–45 and accompanying text.

²³⁶ See, e.g., *Wilson v. O’Brien*, No. 07 C 3994, 2009 WL 763785, at *6 (N.D. Ill. Mar. 20, 2009); *In re Grand Jury Subpoena*, Joshua Wolf (201 F. App’x 430, 433–34 (9th Cir. 2006)); *United States v. Hively*, 202 F. Supp. 2d 886, 894–95 (E.D. Ark. 2002); *In re Ramaekers*, 33 F. Supp. 2d 312, 316–17 (S.D.N.Y. 1999); *United States v. Jennings*, No. 97 CR 765, 1999 WL 438984, at *4 (N.D. Ill. June 21, 1999).

²³⁷ See, e.g., *In re Inquest Subpoena* (WCAX), 890 A.2d 1240, 1241–42 (Vt. 2005); *State v. Moody*, 94 P.3d 1119, 1153 (Ariz. 2004); *Astra USA, Inc. v. Bildman*, 13 Mass. L. Rep. 300 (Mass. Super. Ct. 2001); *In re Owens*, 517 S.E.2d 605, 605 (N.C. 1999) (effectively overturned by subsequent passage of shield law); *In re Union Pac. R.R. Co.*, 6 S.W.3d 310, 312 (Tex. App. 1999).

²³⁸ See *Wilson*, 2009 WL 763785 at *6 (“This Court follows the Seventh Circuit’s lead [in *McKevitt*] by refusing to tread new legal ground.”); *In re Ramaekers*, 33 F. Supp. 2d at 316–17 (relying on *Gonzales I* and *Smith*).

²³⁹ See, e.g., *Hively*, 202 F. Supp. 2d 886, 894 (rejecting protection for nonconfidential information in contradiction of *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 583 F. Supp. 427 (E.D. Mo. 1984)); *In re Union Pac. R.R. Co.*, 6 S.W.3d 310, 312 (Tex. App. 1999) (rejecting protection for nonconfidential in contradiction of *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470 (Tex. App. 1987)).

connection between newsgathering and expression, and in any case it is one to which few judges subscribe. Most judges, including the justices in *Branzburg*, acknowledge that the First Amendment reaches more than just the dissemination of information;²⁴⁰ they simply contend that the state's interests in accessing "every man's evidence"²⁴¹ outweigh those of the journalists. But if the journalists have interests in these situations that are constitutionally rooted, then by definition journalists are differently situated than those who are *not* working under the umbrella of constitutional protections. Furthermore, if journalists have constitutional protections in these situations, and those protections extend to both the press' expressive *and* investigative autonomy, then it makes no sense for judges to categorically deny protection against subpoenas seeking nonconfidential information, nor to create separate balancing tests for assessing confidential and nonconfidential subpoenas.

Some courts have fashioned separate tests for nonconfidential subpoenas based on the assumption that journalists' interests in those situations are less substantial than when they are seeking to protect a source.²⁴² That might be true in many instances, but certainly not all of them. Yet by automatically affording journalists less protection in these situations, judges have no opportunity to take account of and properly balance the unique interests implicated in each case. This kind of policy-based shortcut is efficient, perhaps, but inappropriate as a mechanism for applying constitutional law.²⁴³

Throughout the period of reporter's privilege expansion when principle-based arguments were ascending,²⁴⁴ some courts argued that no distinction ought to be drawn between confidential and nonconfidential source

²⁴⁰ *Branzburg*, 408 U.S. at 707 ("[N]ews gathering is not without its First Amendment protections"); *id.* at 681 ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

²⁴¹ *Id.* at 674 (citations omitted).

²⁴² See, e.g., *Gonzales II*, 194 F.3d at 35–36 (noting that journalists' interests are "narrower" in nonconfidential subpoena cases). The Second Circuit in *Gonzalez II* outlined separate tests for evaluating confidential and nonconfidential subpoenas. *Id.* at 33–36.

²⁴³ These kinds of shortcuts are more tolerable when the courts are applying the privilege as a matter of common law or statutory law, but this Article suggests that even in those contexts, courts ought to take a principle-based approach, which would mirror the constitutional approach described here.

²⁴⁴ The Second Circuit provided one of the earliest examples. *Baker v. F. & F. Inv.*, 470 F.2d 778, 782 (2d Cir. 1972) (arguing that the reporter's privilege serves the "paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.").

subpoenas.²⁴⁵ As the D.C. District Court held, subpoenas targeting nonconfidential materials are “equally as invidious as the compelled disclosure of . . . confidential informants.”²⁴⁶ That kind of argument is almost impossible to find today. Courts have largely ignored the “lurking and subtle threat”²⁴⁷ warning from *United States v. LaRouche Campaign* and have adopted a two-track approach in which nonconfidential subpoenas are scrutinized separately and less exactly than those targeting confidential information. This drop-off is manifest through both the tests that courts have adopted—the language of which is often so weak²⁴⁸ that it adds little to the protections already embedded in the rules of evidence and procedure²⁴⁹—and by the application of those tests by judges who seem to have either lost sight of the social-structural dimensions of the privilege or have simply lost patience with journalists.

The increasing proclivity of some courts to address the reporter's privilege as matter of policy rather than principle is evident in several other ways. Some courts attempt to differentiate the reporter's privilege from other common-law privileges by citing sources like Wigmore's treatise on evidence, which states that the presence of a confidential relationship should be a prerequisite for recognition of any testimonial privilege.²⁵⁰ However

²⁴⁵ See, e.g., *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *Kidwell v. McCutcheon*, 962 F. Supp. 1477, 1480 (S.D. Fla. 1996); *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982); *Maughan v. NL Indus.*, 524 F. Supp. 93, 94–95 (D.D.C. 1981).

²⁴⁶ *Maughan*, 524 F. Supp. at 95 (citation omitted).

²⁴⁷ See *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988).

²⁴⁸ The Second Circuit is typical of many courts, employing two separate tests for nonconfidential and confidential subpoenas. See *Gonzales II*, 194 F.3d at 33–36. Both tests address the relevancy of the information sought, the need for its disclosure and the ease with which the information is obtainable from other sources. But in nonconfidential cases, the subpoenaing party only needs to show that the information sought is “relevant” to a “significant issue” and is “not reasonably obtainable from other available sources.” *Id.* at 36. The confidential source test, meanwhile, requires that the information be “highly material,” “critical” to the claim, and “not obtainable from other available sources.” *Id.* at 33 (citations omitted) (emphasis added). Some courts do not create separate tests but note that confidentiality can be a component in the analysis. See, e.g., *Tripp v. U.S. Dep't of Def.*, 284 F. Supp. 2d 50, 55 (D.D.C. 2003) (listing confidentiality as one of four factors to consider in assessing subpoenas).

²⁴⁹ See *supra* note 38.

²⁵⁰ See, e.g., *Storer Commc'ns Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) (citing 8 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2286 (J. McNaughton rev. ed. 1940)):

Professor Wigmore suggested “four fundamental conditions” as predicates to recognition of any privilege against disclosure of communications: (1) the

pertinent Wigmore's insights might be to questions about the common law of evidence, his criteria are irrelevant to matters of constitutional interpretation. By summoning these kinds of sources, judges—including Justice White in *Branzburg*,²⁵¹ as well as other courts²⁵² and commentators²⁵³—confuse contexts by mixing policy concerns with judgments about principle. Even in the common law context, Wigmore's propositions, crafted in the early 20th century before *any* court had ruled on a reporter's privilege claim,²⁵⁴ are hardly dispositive. As the Supreme Court has said, the overriding concern when creating privileges is that they serve "public ends."²⁵⁵ And certainly the public is served by the recognition of privileges that seek to maintain an active, independent and uninhibited press that can check powerful interests and provide citizens with information they need to self-govern. Those interests are reflected in the constitutional design and are among the fundamental presuppositions of American democracy. They are threatened *any time* the government calls upon a journalist to turn over, or testify about, the products of their investigations, regardless of whether doing so threatens a confidential relationship.²⁵⁶

communications must originate in a confidence that they will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship must be one which, in the opinion of the community, ought to be fostered; and (4) the injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. It is apparent [that] . . . the last three of Professor Wigmore's predicates are lacking.

²⁵¹ 408 U.S. at 690 n.29 (citing Wigmore to reinforce its refusal to recognize a reporter's privilege under the First Amendment).

²⁵² See, e.g., *Convertino v. U.S. Dep't of Justice*, No. 07-CV-13842, 2008 WL 4104347, at * 4 (E.D. Mich. Aug. 28, 2008).

²⁵³ See, e.g., Christopher J. Clark, *The Recognition of a Qualified Privilege for Non-Confidential Journalistic Materials: Good Intentions, Bad Law*, 65 BROOK. L. REV. 369, 387 (1999).

²⁵⁴ The first case in which a federal court addressed the constitutionality of compelled disclosure from reporters was *Garland v. Torre*, 259 F.2d 545, 549–50 (2d Cir. 1958).

²⁵⁵ *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

²⁵⁶ See *Kidwell v. McCutcheon*, 962 F. Supp. 1477, 1480 (S.D. Fla. 1996) (noting that whether or not confidential information is involved "is irrelevant to the chilling effect" that "enforcement of a subpoena would have on information obtained by a journalist in his professional capacity." (citing *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982))).

One final example of the ways in which policy-based approaches to the reporter's privilege are evident is in the demands that courts make of the media litigants and the tone they use in characterizing journalists' interests. Many courts have expressed skepticism about the value of protecting reporters—often employing the same kind of special-rights rhetoric used by the Court in *Branzburg*²⁵⁷—and have flatly rejected the legitimacy of journalists' fears about sources drying up or reporters' autonomy and independence being undermined.²⁵⁸ Many recent opinions treat these assertions by the press with a kind of sneering dismissal. In *Gonzales I*, the Second Circuit said it “seriously doubt[ed] that . . . journalists' decisions on what to publish will in fact be adversely affected by the possibility of having their nonpublished, nonconfidential material subpoenaed,” adding, with some condescension, that the public would actually benefit from the added scrutiny of editorial decisions that would be possible if the privilege were denied.²⁵⁹ The Second Circuit ultimately reversed itself, but its initial opinion was like many others in recent years in which the courts have based their denials of the privilege on the journalists' inability to produce “empirical evidence”²⁶⁰ that their sources would dry up or that the “threat of intrusion into [their] news gathering and editorial process” was more than “speculative.”²⁶¹ These are peculiar expectations. The chilling effect on speech, the wariness of sources, the broader symbolic damage to the image of the press when it cooperates with government—none of these things is readily measurable, but

²⁵⁷ See *supra* note 81.

²⁵⁸ *Id.* at 691 (“Nothing before us indicates that a large number or percentage of all confidential news sources . . . would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.” (emphasis omitted)).

²⁵⁹ *Gonzales v. NBC*, 155 F.3d 618, 624 (2d Cir. 1998) (*Gonzales I*) (“[T]o the extent that the lack of a privilege may affect editorial decisions, it seems that this effect may well accrue to the public's benefit. Specifically, to the extent that the threat of subsequent analysis of editorial decisions increases the accountability of editors for their presentation of the news, such scrutiny is likely to make the final news product more complete, accurate and reliable.”).

²⁶⁰ *Id.*; see also *Judith Miller Subpoena*, 397 F.3d 964, 983 (D.C. Cir. 2005) (Henderson, J., concurring); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998) (pointing to the lack of an “empirical basis” to believe sources will dry up or that reporters will destroy records); *United States v. Hively*, 202 F. Supp. 2d 886, 889 (E.D. Ark. 2002) (“Movants' bare assertion that certain testimony may implicate confidential sources or information is insufficient to satisfy their burden on this issue.” (emphasis added)).

²⁶¹ *United States v. Jennings*, No. 97 CR 765, 1999 WL 438984, at *3 (N.D. Ill. June 21, 1999).

they are no less real because of it. Indeed, the Supreme Court in *New York Times Co. v. Sullivan* showed no reluctance to rewrite the law of defamation based purely on *speculation* that unrestrained libel suits by public officials would chill speech.²⁶² These demands for proof of harm are really misplaced policy considerations that should have little bearing on the recognition of rights, even if they might have some relevance to their application.²⁶³ Instead of using a principle-based approach that presupposes certain harms associated with forced disclosure, the court reverses the analytical order, making the right itself contingent on the demonstration of those harms.²⁶⁴

Throughout the expansion period, most courts began to move past some of the obviously policy-based arguments of the Court in *Branzburg*.²⁶⁵ The lower courts began to accept that the core issue was not the desire of journalists to exempt themselves from the normal obligations of citizenship;²⁶⁶ it was to preserve the social and democratic role of the press by giving its individual practitioners the widest possible latitude to seek and disseminate truthful speech about matters of public interest. Even in cases like *Gonzales II* and the two *Shoen* cases, in which the Second and Ninth Circuits adopted weaker tests for nonconfidential information, they acknowledged the core principles involved and carefully articulated the press' concerns. In *Shoen I*, the court noted that the privilege is "[r]ooted in the First Amendment" and in "recognition that society's interest in protecting the integrity of the news gathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'"²⁶⁷ And in *Shoen II*, the court warned that "routine court-compelled disclosure of research materials poses a serious threat to the

²⁶² 376 U.S. 254, 301 (1964).

²⁶³ In striking the balance between the press's interests and those of the subpoenaing party, the courts might reasonably make some approximations of the relative harm caused by forced disclosure versus the harm to the litigants resulting from the withholding of that information. But that balancing should be subsequent to the initial determination that a balancing of those interests is required.

²⁶⁴ Another example of this was in *Islamic Charities*, where the Second Circuit used the merits of the underlying journalism to determine whether to attach any First Amendment scrutiny in the first place. 459 F.3d 160, 171–72 (2d Cir. 2006) (mischaracterizing the reporters' claims as being about their interest in "informing targets" about "imminent law enforcement asset freezes/searches," and asserting that this is "not an activity essential, or even common, to journalism.").

²⁶⁵ There were many of these, but perhaps the most stunning was the Court's assertion that the press doesn't need a privilege because it "has flourished" for so long without one. *Branzburg*, 408 U.S. at 698–99.

²⁶⁶ *Id.* at 682.

²⁶⁷ 5 F.3d 1289, 1292 (9th Cir. 1993).

vitality of the news gathering process.”²⁶⁸ *Gonzales II* provides an even more detailed accounting of the interests of the press, despite the fact that the court ultimately required the journalists to comply. Even though these courts’ tests and conclusions are not in line with a pure autonomy framework, they are nevertheless suffused with principle-based reasoning and plainly stand apart from the terse²⁶⁹ and glib²⁷⁰ opinions in some recent cases.

C. Legal-Procedural Context

In addition to the increasing tendency of courts to separate confidential and nonconfidential subpoenas—with some courts categorically denying protection against the latter—many are employing a similar approach with respect to the nature of the underlying proceeding. This was probably an inevitable consequence of the Court’s fractured ruling in *Branzburg*. Because *Branzburg* involved the narrow context in which journalists observed criminal acts and were subpoenaed by grand juries, and because Justice Powell, who preferred a case-by-case approach, supplied the fifth vote, many lower courts felt free to craft different standards in factually distinct cases. The opinion of the Court in *Branzburg* was certainly an emphatic renunciation of the privilege, but it was largely gutted by Powell’s concurrence.

Powell agreed with the Court’s disposition of the cases in *Branzburg*, but his concurrence is philosophically more compatible with the approach of the dissenters than with the opinion of the Court. In the first line of his concurrence, Powell makes clear that reporters have First Amendment rights to gather news *and* to protect their sources.²⁷¹ He agreed that in the peculiar contexts presented in that case, the rights of the reporters were outweighed by the grand jury’s interest in obtaining relevant evidence. But he clearly endorsed the need for some protection, and, like the dissenters, suggested that the subpoenaing party ought to be required to demonstrate that their *need*²⁷² for the information is sufficiently weighty and that it is *relevant*²⁷³ to

²⁶⁸ 48 F.3d 412, 416 (9th Cir. 1995).

²⁶⁹ See, e.g., *In re Grand Jury Subpoena*, Joshua Wolf, 201 F. App’x 430 (9th Cir. 2006); *Lee v. Dep’t of Justice*, 413 F.3d 53 (D.C. Cir. 2005).

²⁷⁰ See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *Taricani Proceedings*, 373 F.3d 37, 44–45 (1st Cir. 2004).

²⁷¹ *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

²⁷² *Id.* at 710 (noting that journalists may seek to quash subpoenas when their “testimony implicates confidential source relationships without a legitimate need of law enforcement.”).

²⁷³ *Id.* (suggesting that journalists should be able to quash subpoenas “bearing only a remote and tenuous relationship to the subject of the investigation.”).

the underlying claim—two of the three components of the dissenters' proposed test.²⁷⁴

Powell's concurrence plainly stands apart from White's opinion from the Court in at least two ways. First, Powell recognized the need for a privilege (at least for the protection of reporters' sources) and saw it as not merely a desirable policy preference but a constitutional requirement.²⁷⁵ Second, he did not link that protection to particular legal contexts, even though the subpoenas in question in *Branzburg* happened to relate to grand jury inquiries. Powell wrote separately because he wanted courts to have the discretion to weigh the competing interests in each case.²⁷⁶ Indeed, when constitutional rights are implicated, the courts must be sensitive to the unique facts presented, and, as Powell concluded, a "case-by-case [approach] accords with the tried and traditional way of adjudicating such questions."²⁷⁷

In light of all this, it is surprising how many courts in recent cases have re-read *Branzburg* entirely through the lens of the four-vote opinion of the Court and have either ignored Powell's concurrence or treated it as an irrelevant appendage.²⁷⁸ The most strident denunciations of the privilege have occurred in grand jury cases (*Judith Miller*, *Joshua Wolf*, *James Taricani*, *McKevitt*, et al.) where the contextual parallels invite an easy

²⁷⁴ See *supra* note 1.

²⁷⁵ *Branzburg*, 408 U.S. at 710 (Powell, J., concurring) (emphasizing the need to balance "vital constitutional and societal interests").

²⁷⁶ Powell might have believed that the legal context should be a factor in the balancing of interests, but not that the privilege should be uniformly denied in particular types of proceedings.

²⁷⁷ *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). Powell distinguishes his approach from the dissenters' by suggesting that the latter would give journalists the power to completely ignore subpoenas in the absence of a specific demonstration by the government that all three of the dissenters' proposed requirements were met. *Id.* at 710 n.1. But that is generally not how this has worked in subsequent litigation and under the state shield laws that incorporate Stewart's criteria. In most cases, the subpoena is served on the journalists who then file motions to quash, at which point the courts apply the criteria in evaluating the legitimacy of the subpoena. Perhaps Powell wanted journalists to appear and to invoke the privilege on a more item-by-item basis. But to a great extent, Powell's footnote raises a distinction without a difference.

²⁷⁸ It should be noted here that even during the expansion period, courts were reluctant to extend much protection to reporters subpoenaed in grand jury cases. A typical approach was employed by the Ninth Circuit, which held that in interpreting *Branzburg* a limited balancing of First Amendment interests may be conducted only "where a grand jury inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate need of law enforcement, or has only a remote and tenuous relationship to the subject of the investigation." *Scarce v. United States*, 5 F.3d 397, 401 (9th Cir. 1993). Nevertheless, the tone in the more recent cases is sharper and more dismissive and tends to cast doubt on some of the theoretical bases of the privilege.

absolutism. Those courts oversimplify, however, by using the legal-procedural context to categorically reject the privilege in all grand jury proceedings.²⁷⁹ Even if that is a reasonable reading of the opinion of the Court in *Branzburg*, it is not likely what Powell had in mind when he sought to preserve the discretion of judges to make case-specific assessments. It would be fair for judges in *particular* grand jury cases to draw parallels to *Branzburg* and perhaps to conclude that the journalists' interests are outweighed by the needs of the court. But it is impossible to read *Branzburg* as requiring the categorical exclusion of protection in *all* grand jury cases without dismissing or recasting the concurring fifth vote.

The various grand jury cases described in Part III.A illustrate both the hostility with which privilege claims are being received and the simplicity with which courts are reading *Branzburg*. But perhaps the more ominous trend is the tendency of courts to extend the unqualified interpretation of *Branzburg* to all criminal cases, not merely those involving grand juries. The Fifth Circuit was explicit about this in *United States v. Smith*,²⁸⁰ saying there is "little persuasive force in [the] distinction" between grand jury cases and other criminal cases,²⁸¹ and other courts have recently declared or implied that the criminal nature of the underlying case is dispositive of privilege claims.²⁸² The federal district court ruling in *United States v. Libby*²⁸³ typifies the new analytical approach. That case involved the criminal trial of former Vice Presidential Chief of Staff I. Lewis "Scooter" Libby, who was charged with obstruction of justice and other crimes relating to his role in the

²⁷⁹ See *Judith Miller Subpoena*, 397 F.3d at 970:

Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question.

²⁸⁰ 135 F.3d 963 (5th Cir. 1998).

²⁸¹ *Id.* at 971. The court notes that *Branzburg* "gave no indication that it meant to limit its holding to grand jury subpoenas." *Id.* (quoting *Branzburg*, 480 U.S. at 690–91).

²⁸² See, e.g., *Taricani Proceedings*, 373 F.3d 37, 44–45 (1st Cir. 2004); *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003); *United States v. Libby*, 432 F. Supp. 2d 26, 46–47 (D.D.C. 2006); *United States v. Hivley*, 202 F. Supp. 2d 886, 890–92 (E.D. Ark. 2002). For a state court example, see *In re WTHR-TV*, 693 N.E.2d 1 (Ind. 1998). Some courts make reference to both the procedural (civil v. criminal) and substantive (confidential v. nonconfidential) contexts without making clear which is most critical, or whether they are to be considered in concert with each other. See, e.g., *United States v. Lindh*, 210 F. Supp. 2d 780, 783 (E.D. Va. 2002).

²⁸³ 432 F. Supp. 2d 26 (D.D.C. 2006).

illegal disclosure of classified information.²⁸⁴ Several reporters were subpoenaed to testify about their interactions with Libby and moved to quash, citing both the First Amendment and federal common law. Judge Reggie Walton acknowledged that the question of whether *Branzburg* applies to all criminal cases “is still wildly disputed” and cited several circuit court cases addressing the issue.²⁸⁵ Interestingly, most of those courts required a balancing test,²⁸⁶ and in only two cases (*United States v. Smith*²⁸⁷ and *In re Shain*²⁸⁸) did the court find the privilege to be inapplicable. Nevertheless, Walton concluded that the “reasoning in *Branzburg* applies with equal force to [criminal trials] as it does in grand jury proceedings.”²⁸⁹ Furthermore, “it would simply be inappropriate” to use the same standard in criminal cases that courts use in civil cases, because “the need for information in the criminal context is much weightier.”²⁹⁰ Not only are there concerns about the rule of law in criminal cases, Walton wrote,²⁹¹ but those seeking information in civil cases “[do] not share the urgency or significance” of their counterparts in criminal cases where people’s lives and liberties are at stake.²⁹²

Walton and the other courts that have employed the same analysis are certainly correct that the subpoenaing parties in criminal cases will usually have a more powerful claim to the information than the parties in civil cases. But that does not mean all criminal subpoenas are *intrinsically* more vital than civil subpoenas. Courts that work from that starting point are using quintessentially policy-based assumptions, relying on probabilities and generalizations. They are acting more like insurance actuaries, using inexact but absolute categorizations, rather than caretakers of vital constitutional interests. Indeed, these courts routinely emphasize the point that there are two constitutional rights at stake in these cases that must be judiciously balanced,

²⁸⁴ Libby was accused of illegally disclosing the identity of undercover CIA agent Valerie Plame Wilson. See Van Natta et al., *supra* note 95.

²⁸⁵ *Libby*, 432 F. Supp. 2d at 46.

²⁸⁶ *Id.* (citing *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Pretzinger*, 542 F.2d 517, 520–21 (9th Cir. 1976)).

²⁸⁷ 135 F.3d 963, 972 (5th Cir. 1998).

²⁸⁸ 978 F.2d 850, 853 (4th Cir. 1992).

²⁸⁹ *Libby*, 432 F. Supp. 2d at 46.

²⁹⁰ *Id.* (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 384 (2004)).

²⁹¹ *Id.*

²⁹² *Id.* (quoting *Cheney*, 542 U.S. at 384).

yet they resolve this dilemma by completely abrogating the rights of the press.²⁹³

These cases stand in contrast to the body of case law that developed in the post-*Branzburg* period of expansion. Many courts from the mid-1970s through the late-1990s confined *Branzburg* to grand jury cases²⁹⁴ (occasionally reading *Branzburg* as providing at least some protections in those cases²⁹⁵), and they routinely extended the privilege to other criminal cases as well.²⁹⁶ As the Third Circuit argued in *Cuthbertson*, a journalist's "interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal."²⁹⁷ This became the prevailing orientation of most courts, which drew no initial distinctions between subpoenas in civil versus criminal cases, even though they considered the nature of the proceeding when executing their balancing tests.²⁹⁸

²⁹³ See *id.* (making a categorical distinction between criminal and civil subpoenas, and suggesting that criminal subpoenas should be evaluated under the Court's *Branzburg* framework, whether or not those subpoenas originate in the context of a grand jury).

²⁹⁴ See, e.g., *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975).

²⁹⁵ See, e.g., *Storer Commc'ns Proceedings*, 810 F.2d 580, 585 (6th Cir. 1987) (rejecting a general privilege but reading *Branzburg* and the Powell concurrence as prohibiting the use of subpoenas to harass reporters and disrupt their relationships with sources, and requiring that the subpoenas serve the legitimate needs of law enforcement and be more than remotely or tenuously related to the underlying proceeding); *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358 (W.D. Pa. 1991) (recognizing a common law privilege in grand jury contexts).

²⁹⁶ See, e.g., *Brown v. Commonwealth*, 204 S.E.2d 429, 431 (Va. 1974).

²⁹⁷ *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980).

²⁹⁸ As the Third Circuit noted in *Cuthbertson*:

A defendant's sixth amendment and due process rights certainly are not irrelevant when a journalists' privilege is asserted. But rather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant's need for the information.

Id. Some courts also made the nature of the proceeding an explicit component of their balancing tests. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977). *Silkwood* was a civil case, but courts in that circuit apply the test across contexts. See, e.g., *United States v. Foote*, No. 00-CR-20091-01-KHV, 2002 WL 1822407, at *2 (D. Kan. Aug. 8, 2002).

Some courts continue to employ the more protective standards,²⁹⁹ but many others are carving away the protections in criminal cases, with some even denying the basic protections required under *Branzburg*.³⁰⁰ The Seventh Circuit, in another opinion by Judge Posner, has gone so far as to say that there is *no* “reporter’s privilege in federal cases,” civil, criminal or otherwise.³⁰¹ None of these conclusions can be squared with the baseline assumption of most courts that *some* First Amendment interests are affected by the issuance of subpoenas. If that is true, as the Court in *Branzburg* implied,³⁰² and as Powell emphasized,³⁰³ then some kind of accounting of those interests must be made—not through predetermined classifications but through nuanced, case-specific examinations. This is the way the Court has typically resolved constitutional conflicts in other settings,³⁰⁴ and it is the only way to approach these issues as a matter of First Amendment law.

The balancing approach favored by most courts throughout the expansion period and that many courts still apply is also the most compatible with a principle-based conception of the privilege. A few courts have avoided addressing the constitutional dimensions of the privilege by instead

²⁹⁹ See, e.g., *Footnote*, 2002 WL 1822407 at *2 (“[T]he Court sees no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter’s interest in confidentiality should yield to the moving party’s need for probative evidence.”).

³⁰⁰ See *Taricani Proceedings*, 373 F.3d 37, 44–45 (1st Cir. 2004). The court noted that in the First Circuit, past rulings require “that the disclosure of a reporter’s confidential sources may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source.” *Id.* at 45. The court questioned, however, whether even these minimal protections were constitutionally required or were merely “prudential considerations.” *Id.*

³⁰¹ U.S. Dep’t of Educ. v. NCAA, 481 F.3d 936, 938 (7th Cir. 2007).

³⁰² *Branzburg*, 408 U.S. at 707 (“[N]ews gathering is not without its First Amendment protections . . .”).

³⁰³ *Id.* at 710 (Powell, J., concurring) (“The asserted claim to privilege should be judged on its facts by the striking of a *proper balance* between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”) (emphasis added).

³⁰⁴ See *Globe Newspapers v. Superior Court*, 457 U.S. 596, 606–11 (1982) (striking down state law that excluded press and public from observing certain trial proceedings without affording judges the discretion in each case to weigh the First Amendment interests against the asserted need for closure); see also *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.”).

recognizing the privilege as a matter of federal common law.³⁰⁵ In doing so, they have emphasized the fact that freeing press from unnecessary impediments to its expressive or investigative activities is an important social concern. They have also avoided the temptation to work from a purely policy-based orientation and have provided robust protection that is not contingent on the presence of particular substantive or procedural features.³⁰⁶

There are certainly substantial grounds upon which to justify a common law reporter's privilege. Courts have recognized protections for the communications between husbands and wives and for psychotherapists and their patients, so it requires no prestidigitation to justify protections for journalist whose interests are linked to core social values enshrined in the Constitution and whose activities serve not only their own ends but the public's as well.³⁰⁷

In light of all that has occurred since 1972, with lower courts delimiting *Branzburg* and recognizing various forms of the privilege and with dozens of state legislatures passing shield laws, there is an unusually strong foundation for recognition of a common-law privilege. Some circuit judges have recently made powerful arguments in favor of that recognition, including Judge Tatel in *Judith Miller*,³⁰⁸ and Judge Robert Sack in *Islamic Charities*.³⁰⁹

³⁰⁵ See, e.g., *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 368 (W.D. Pa. 1991). Federal courts are explicitly authorized to do this under Federal Rule of Evidence 501, which was adopted three years after *Branzburg*. Pub. L. No. 93-595, 88 Stat. 1926 (1975). Privileges established under the rule must serve "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980) (internal quotation marks omitted)).

³⁰⁶ See, e.g., *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1998) (*Gonzales II*); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358 (W.D. Pa. 1991). Some courts, like the Second Circuit in *Gonzales II*, have limited their holdings to the specific facts presented but have not sought to confine the common-law protection to those contexts.

³⁰⁷ In *Riley*, for example, the court noted that its recognition of a privilege was based, in part, on the "strong public policy which supports the unfettered communication to the public of information and opinion . . ." 612 F.2d at 715. The court added that this privilege was "rooted in the First Amendment." *Id.* at 718.

³⁰⁸ *Judith Miller Subpoena*, 397 F.3d 964, 991-95 (D.C. Cir. 2005) (Tatel, J., concurring).

³⁰⁹ *Islamic Charities*, 459 F.3d 160, 174-89 (2d Cir. 2006) (Sack, J., dissenting). Sack argued that "[a] qualified journalists' privilege seems . . . easily—even obviously—to meet each of th[e] qualifications" required by the Supreme Court. *Id.* at 181. He added: "The protection exists. It is palpable; it is ubiquitous; it is widely relied upon; it is an integral part of the way in which the American public is kept informed and therefore of the American democratic process." *Id.*

Nevertheless, most of the recent court majorities have scoffed.³¹⁰ The First Circuit was particularly blunt in the James Taricani case, dismissing the common-law argument as “newly hewn” and insisting that it was “flatly rejected” by *Branzburg*.³¹¹

But the opinion of the Court in *Branzburg* is hardly conclusive on the common law issue—indeed, Powell never spoke to it—and it is absurd to suggest that judges should treat the Court’s decades-old statements about the common law as if they had been preserved in amber. Situations like this are the common law’s *raison d’être*. Nevertheless, this is the state of things in this pathological period where the rights of the press to gather news are both attenuated and receding, and where some judges treat journalists’ claims with a palpable cynicism.

Part IV addresses some of the legislative responses to these shifts, assesses the extent to which those remedies reflect principle- or policy-base approaches, and looks at the broader discourse about the reporter’s privilege and what it says about (and how it affects) the scope and trajectory of the law.

IV. LEGISLATIVE RESPONSES AND EXTRA-JUDICIAL ARGUMENTS

If there is any cause for optimism in this pathological period, it is that thirty-seven states have now passed shield laws—several just in the past few years—and Congress is on the cusp of passing the Free Flow of Information Act (FFIA), which would some provide statutory protection for journalists subpoenaed in federal cases. These are good signs, and shield laws are useful as far as they go. But they are no panacea. Their principal value is in establishing some baseline protection that compels judges to engage in at least *some* balancing. But the overall effect of these statutes is dependent on the proclivities of judges and the vigor with which they apply the tests. As media lawyer Mark Anfinson says, “[t]he balancing test—let’s face it—is putty in the hands of the court. It doesn’t mean anything in an objective sense. You’ve got to make your case.”³¹² That is harder to do at a time when so many judges are inclined to doubt the hardship—much less injustice—of compelled disclosure. Indeed, the retreat on the reporter’s privilege has been less about changes in the underlying legal-constitutional architecture than about failures in the interpretation and application of those requirements.

³¹⁰ See, e.g., *In re Grand Jury Subpoena*, Joshua Wolf, 201 F. App’x 430, 433 (9th Cir. 2006); *In re Special Counsel Investigation*, Matt Cooper, 332 F. Supp. 2d 26, 32 (D.D.C. 2004).

³¹¹ *Taricani Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004).

³¹² Telephone Interview with Mark Anfinson, Lawyer and Counsel to the Minnesota Newspaper Association (June 3, 2009).

Some of the provisions of the congressional shield bills and state shield laws are examined below with those realities in mind.

A. A Federal Shield Law?

The most encouraging response to the regression in the federal courts has been the effort by some members of the U.S. House and Senate to pass a federal shield law. As of this writing, the House had, for the second time in the past two sessions, overwhelmingly passed its version of the FFIA, while the Senate bill had been approved by the Judiciary Committee but had not yet been voted on by the full Senate. It is impossible to know whether, or when, the full Senate will consider the bill, and it is even more difficult to predict what form the legislation will take after going through a conference-committee grinder, but there are some serious problems with the raw materials. Both bills are flawed, even though either one, if passed, would be a step forward.

The House bill³¹³ and the Senate bill³¹⁴ were both introduced in February 2009 and are identical to the bills introduced in 2007.³¹⁵ The two bills have several similarities, the most important of which is that they would require courts in federal cases to apply a balancing test before obligating journalists to comply with subpoenas. The balancing tests in both bills are relatively strong. Each would require the subpoenaing party to “exhaus[t] all reasonable alternative sources”³¹⁶ and to demonstrate that the information sought is either “critical”³¹⁷ or “essential”³¹⁸ to the resolution of the case. Both also include a public-interest balancing provision that requires judges to uphold subpoenas only where “the public interest in compelling disclosure of the information . . . outweighs the public interest in gathering or disseminating news or information.”³¹⁹

Although they provide some strong presumptive protection, both bills are pockmarked with exceptions. Under the Senate bill, reporters have no shield against subpoenas relating to criminal or tortious conduct that reporters observe.³²⁰ However, reporters are not automatically compelled to reveal the

³¹³ H.R. 985, 111th Cong. (2009).

³¹⁴ S. 448, 111th Cong. (2009).

³¹⁵ See *supra* note 13.

³¹⁶ H.R. 985 § 2(a)(1); S. 448 § 2(a)(1).

³¹⁷ H.R. 985 § 2(a)(2)(A)(ii), (B).

³¹⁸ S. 448 § 2(a)(2)(A)(ii), (B).

³¹⁹ H.R. 985 § 2(a)(4). The Senate bill's language is substantially similar. S. 448 § 2(a)(3).

³²⁰ S. 448 § 3(a).

sources of illegally leaked classified information, except where the leak would harm national security.³²¹ Reporters are not protected when the subpoena seeks information that could prevent kidnapping, death or substantial bodily injury,³²² or where the information sought could assist in the prevention of terrorism or other threats to national security.³²³ Under the House bill, reporters' confidential sources are also specifically exempted from disclosure requirements unless the identity of the source is necessary to protect against terrorism or other threats to national security,³²⁴ to prevent death or significant bodily injury,³²⁵ or to reveal the identity of someone responsible for disclosing a trade secret or other private information.³²⁶ Both bills would allow the privilege to be claimed in civil and criminal cases and both rely on a preponderance of the evidence standard.

Despite their many virtues, each bill has a major limitation. The House bill uses a definition of "journalist" that is far too narrow and only protects those who regularly gather and disseminate news "to the public for a substantial portion of [their] livelihood or for substantial financial gain."³²⁷ The Senate bill, meanwhile, has a much more egalitarian definition of journalist³²⁸ but only protects information linked to confidential sources,³²⁹ which means the privilege would be inapplicable to 97% of subpoenas.³³⁰ Neither of these conditions is acceptable under a principle-based conception of the privilege, which would not permit distinctions to be made—as an initial matter anyway—between confidential and nonconfidential information, and which would extend the protections to anyone serving the purposes of the underlying right, whether or not they do so for a living. Of

³²¹ *Id.* § 2(a)(2)(A)(iii).

³²² *Id.* § 4.

³²³ *Id.* § 5.

³²⁴ H.R. 985 § 2(a)(3)(A).

³²⁵ *Id.* § 2(a)(3)(B).

³²⁶ *Id.* § 2(a)(3)(C).

³²⁷ *Id.* § 4(2).

³²⁸ Senate Bill 448, Section 8(2) says a "covered person" is anyone engaged in journalism, which is defined in Section 8(5) as "the regular gathering, preparing, collecting . . . of news or information that concerns local, national or international events or other matters of public interest for dissemination to the public." The word "regular" was deliberately added to exclude certain bloggers or freelancers who are not actively engaged in journalism. Nevertheless, this is still a functional definition that is not limited to professional journalists.

³²⁹ *Id.* § 8(6).

³³⁰ Jones, *supra* note 18, at 643. It is also important to note that the vast majority of subpoenas are issued in state courts, so the broader problems described in this Article would not be substantially altered by passage of a federal shield law.

course, Congress is not obligated to take a principle-based approach. It is free to apply policy-based criteria and to outline the scope of the law using whatever categories, exceptions or definitions it prefers. But when a law is crafted in direct response to the failure of the courts to apply the constitutionally appropriate framework, and when its ostensible purpose is to serve principles that are foundational, both in terms of individual liberty and the broader structural arrangement of our democratic system, then the ideal framework would be one organized entirely around those principles.

Neither of these bills is a pure reflection of a principle-based conception of the privilege, although both would certainly enhance the protections available to many reporters, particularly those working in circuits like the Fifth, Sixth, and Seventh. The legislation would also add some predictability to the law. Still, there would be a lot of work for courts to do in applying this legislation. The same kinds of interpretive challenges that exist in the First Amendment and common law contexts would carry over to this one as well. What is “critical” or “essential” information? What constitutes a threat to national security? How exhaustively do subpoenaing parties need to search for “alternative sources” of information? Favorable rulings on these issues will require an attitudinal shift within the judiciary and a willingness of judges to put their thumbs back on journalists’ side of the scale.

The other potential drawback of a federal shield law is that it could serve to forestall judicial consideration of the First Amendment and common law dimensions of the privilege. Courts might be inclined to treat the explicit language of the statute as the essential framework and to end its analysis there, treating the shield law as effectively preempting constitutional or common law analyses. Courts in jurisdictions that already provide broader protections than those afforded under the proposed federal shield law must not allow their reporter’s privilege doctrine to contract toward the narrower protections of the statute. And those federal courts that have not addressed—or that have not precisely defined—the constitutional or common law iterations of the privilege should not allow passage of a shield law to preempt or circumscribe those analyses.

B. State Shield Laws

The thirty-seven state shield laws provide a mixed assortment of protections and exceptions that are only partially faithful to a fundamental-rights view of the privilege. Like all statutes, shield laws are negotiated arrangements that tend to emphasize lowest-common-denominator protections. Nevertheless, some shield laws are very protective and use

balancing tests that put a heavy burden on the subpoenaing party,³³¹ and a few states even provide absolute protection for confidential-source information.³³² In other states, the tests are less demanding,³³³ and some employ softer criteria in civil cases³³⁴ or when subpoenas seek nonconfidential information.³³⁵ The shield laws also use substantially varied definitions of “journalist” and “press.” The Alabama shield law, for example, only protects those who are “connected with or employed by a newspaper, radio or television station”³³⁶ The Eleventh Circuit interpreted this language as excluding protection for magazines, because they were not specifically mentioned,³³⁷ and certainly this language would not encompass bloggers or other non-traditional journalists. Many other shield laws use definitions similar to the Alabama law, sometimes adding words like “business,”³³⁸ “accredited”³³⁹ or “bona fide”³⁴⁰ to further separate those working for less mainstream news outlets.

Many of these laws were enacted before the explosion of online communication and were the result of lobbying by mainstream media organizations, so the shield-law definitions tend to reflect a professional or expert definition of the press.³⁴¹ In addition, some of the exclusions contained in these laws might be artifacts of the give-and-take legislative

³³¹ See, e.g., N.Y. CIV. RIGHTS LAW § 79-h(c) (Gould 2009) (providing absolute protection for confidential information and requiring disclosure of nonconfidential information only where the information sought “(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party’s claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source”).

³³² See, e.g., ALA. CODE § 12-21-142 (2009); ARIZ. REV. STAT. ANN. § 12-2237 (2009).

³³³ See, e.g., DEL. CODE ANN. 10. § 4323 (a) (2009) (providing strong protection for confidential information but requiring disclosure of nonconfidential information whenever the “judge determines that the public interest in having the reporter’s testimony outweighs the public interest in keeping [it] confidential”).

³³⁴ See, e.g., N.J. STAT. ANN. § 2A:84A-21 (West 2009); CAL. EVID. CODE § 1070 (West 2009) (providing absolute protection in civil cases and qualified protection in criminal cases).

³³⁵ See, e.g., ME. REV. STAT. ANN. 16. § 61 (2009); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2009); R.I. GEN. LAWS § 9-19.1-2 (2009).

³³⁶ ALA. CODE § 12-21-142 (2009).

³³⁷ See *Price v. Time, Inc.*, 416 F.3d 1327, 1340–41 (11th Cir. 2005).

³³⁸ See, e.g., 735 ILL. COMP. STAT. § 5/8-902 (2009).

³³⁹ See, e.g., R.I. GEN. LAWS § 9-19.1-2 (2009).

³⁴⁰ See, e.g., IND. CODE § 34-46-4-1 (2009).

³⁴¹ See Ugland & Henderson, *supra* note 61.

process rather than evidence of conceptual disagreements.³⁴² Whatever the causes of these imperfections, most shield laws do not fully embody the features of a principle-based conception of the privilege and can therefore entrench some of the problems they were enacted to solve.

These problems persist in the more recent shield law debates as well. The Texas shield law, signed into law in May 2009, uses an expert definition of journalist,³⁴³ and legislators in Kansas shot down a shield bill in February 2009 in part over disagreements about whom it should cover.³⁴⁴ In 2008, Maine passed a shield law that only protects confidential source information.³⁴⁵ Not incidentally, the Maine law is called An Act to Shield Journalists' Confidential Sources, which clearly puts the emphasis on the interests of sources rather than the press. The sponsors of a proposed shield law in Wisconsin have taken this a step further, calling their bill the Whistleblower Protection Act, even though its provisions are not unlike those of many other shield laws. In the case of both Maine and Wisconsin, the titles of the legislation were likely chosen very deliberately to diffuse criticisms from those who view shield laws as "special interest legislation"³⁴⁶ for the press. The effect of these strategic choices, however, could be to further obscure the autonomy arguments that have traditionally undergirded the privilege and to reinforce the view that the privilege is largely, if not solely, about the practical public benefits of protecting leakers. And they reflect the broader problem with shield laws, which is that they typically offer a heavily circumscribed set of protections under which the rights of the press are pre-bridged to accommodate opponents, many of whom still cling to the misapprehension that the privilege exists to exalt journalists as a "special class of citizens."³⁴⁷

³⁴² See, e.g., Kelly Shannon, *Texas Governor Signs Shield Law to Protect Journo*s, EDITOR & PUBLISHER, May 14, 2009, http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003973183 (describing the practical hurdles and negotiations involved in getting the Texas shield law passed).

³⁴³ TEX. CIV. PRAC. & REM. CODE ANN. § 22.021(2) (Vernon 2009) (defining "Journalist" as someone who gathers and disseminates news "for a substantial portion of [their] livelihood or for substantial financial gain").

³⁴⁴ See Bill Dalton, *KS Shield Law for Journalists Backburnered*, KANSAS CITY.COM, Feb. 18, 2009, <http://primebuzz.kcstar.com/?q=node/17251>.

³⁴⁵ ME. REV. STAT. ANN. tit. 16, § 61 (2009).

³⁴⁶ Grant Penrod, *Buttressing the First Amendment*, 29 NEWS MEDIA & LAW 4 (2005) (quoting Professor Jane Kirtley) (characterizing the common arguments of shield-law opponents).

³⁴⁷ Dalton, *supra* note 344.

C. Lawyer Responses: Practical Strategies and Pathological Perspectives

The lawyers who represent journalists and media organizations, several of whom were interviewed for this Article, have observed the judicial shift away from the principle-based reporter's privilege and have adapted their approaches accordingly, although not always in ways that help solve the underlying problem. It is clear they sense some negative movement within the judiciary. And these changes—whether incremental or tectonic—are forcing lawyers to make a choice between standing firm on principle or softening their responses in order to work out the best short-term arrangement for their clients.

Although federal court rulings on the privilege began to shift in the late 1990s and early 2000s, some lawyers say that the most dramatic changes have occurred more recently. One lawyer for a national media company said he has noticed a “significant uptick” in the number of confidential-source subpoenas in the past five years, especially in federal cases,³⁴⁸ and Associated Press General Counsel Dave Tomlin reported a “slight uptick” in all subpoena activity, but particularly in federal cases.³⁴⁹ Meanwhile, Eve Burton, general counsel for the Hearst Corporation, said her organization experienced a “dramatic spike” in subpoena activity in the mid-2000s.³⁵⁰ Burton said that in 2004, for example, Hearst received just “a handful” of subpoenas, but there was a surge in 2005, and that by 2006 and 2007, Hearst had “a whole docket of them.”³⁵¹ Burton said Hearst received 135 subpoenas in 2008 and it was on a similar pace for 2009.³⁵²

This increase is partly attributable to what Burton calls the “march of Article II.”³⁵³ During the Bush Administration there were dozens of proceedings initiated by the executive branch in which journalists were targeted for information. Burton contends that many members of the Bush Administration believed in the inherent supremacy of the Executive Branch and that this political philosophy became a legal strategy.³⁵⁴ This also spilled

³⁴⁸ This interviewee requested anonymity in order to preserve his client confidences and to avoid tipping his hand on litigation strategy.

³⁴⁹ Telephone Interview with Dave Tomlin, General Counsel, Associated Press (June 3, 2009).

³⁵⁰ Burton Interview, *supra* note 21.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

over into the civil context, she said, where private litigants began to believe "they could have whatever they wanted from the press."³⁵⁵

Mark Anfinson, who represents the Minnesota Newspaper Association, said he has not seen an increase in the numbers of subpoenas at the state level but says state court judges are generally less solicitous of the press' claims than in the past.³⁵⁶ Anfinson says the "robust support and defense of the media that you saw quite broadly on the bench" in earlier periods has withered, and that the backward "swinging of the pendulum" is apparent not only in the privilege context but also in libel, access and other cases affecting journalists.³⁵⁷ Robert Dreps, who represents the Wisconsin Newspaper Association, points out that in earlier periods "[Judges] were the ones who were pushing the envelope . . . in terms of finding [new] protections and broadening them," but there is now a snowball effect in the opposite direction.³⁵⁸ Some courts are re-reading *Branzburg* and other cases, and because "judges are emboldened by what they see each other doing," that negative momentum has started to build.³⁵⁹ Burton adds that the press has "always had one branch of government on [its] side and usually two" and that during the expansion period the reporter's privilege became settled law, sometimes with the help of all three branches.³⁶⁰ "Now," Burton says, "we have zero."³⁶¹

Anfinson said he sees the effects of these shifts in the level of buy-in from judges about the core rationales underlying the privilege. He says that in Minnesota, where there is a strong shield law, he used to be able to defeat subpoenas by simply citing the statute, because judges were already sympathetic to the philosophical purpose of the statute. "I don't do much of that anymore," Anfinson says, "because I think it is a likely loser."³⁶² He says that lawyers have to make the policy case and push harder to get judges

³⁵⁵ *Id.*

³⁵⁶ Anfinson Interview, *supra* note 312.

³⁵⁷ *Id.*

³⁵⁸ Telephone Interview with Robert Dreps, Lawyer and Counsel to the Wisconsin Newspaper Association (June 9, 2009).

³⁵⁹ *Id.* Dreps said this was more the case at the federal level and that he had not noticed the same changes occurring in Wisconsin where judges have been more solicitous and where the law is more clearly defined. *Id.*

³⁶⁰ Burton Interview, *supra* note 21.

³⁶¹ *Id.* This is probably an overstatement. It seems likely that Congress will pass a federal shield law sometime in the next couple of years, and several states have enacted shield laws in the past few years. But there is certainly plenty of evidence to justify Burton's general discouragement.

³⁶² Anfinson Interview, *supra* note 312.

to appreciate the broader goals of the privilege and the longer-term consequences of its denial.

This is always harder in nonconfidential-source cases, where the interests of sources are not directly implicated. According to New York Times Company General Counsel George Freeman, “The first instinct of every judge is the same, which is that if it’s a confidential source, they understand the seriousness of the question. If it’s not a confidential source . . . at first instinct they’re always terribly unsympathetic.”³⁶³ Freeman says that the shifts occurring in the courts are partly “the result of what works,” and that the need to protect sources “is an easier argument for judges to grab onto.”³⁶⁴

This reality ultimately shapes the Times Company’s legal strategy. Freeman said that “[w]e tend to at least go one round even in the nonconfidential context, but generally speaking if we lose that round, we won’t appeal . . . whereas with a confidential source we would appeal and let it play out.”³⁶⁵ The Associated Press (“AP”) takes a similar approach. Tomlin said that in his organization, “[t]he highest value is placed on confidential information” and the AP will fight those subpoenas aggressively, even to the point of accepting contempt sanctions.³⁶⁶ With nonconfidential subpoenas, Tomlin says, AP will “go through the motions every time,” but that the organization’s response is limited by “whatever statute or case law or constitutional law applies.”³⁶⁷

Several lawyers emphasized that because subpoenas are largely negotiated outside the courtroom, lawyers’ tactical approaches can make all the difference. Tomlin said, “Even though we regard the protection, particularly in federal cases, as somewhat threadbare, the practical protection is in the trouble it takes [the subpoenaing party] to go through those motions to get the stuff.”³⁶⁸ Dreps and Anfinson also noted the importance of the interactions with the subpoenaing party and that the best defense is in making clear that they are determined to fight.³⁶⁹ As Burton put it, “the law is not as

³⁶³ Telephone Interview with George Freeman, General Counsel, N.Y. Times Co. (June 1, 2009).

³⁶⁴ *Id.* Freeman says that the same obstacles arise in criminal cases, where judges are always predisposed to ordering compliance. *Id.* As Anfinson put it, in criminal cases “you are often up against the bloody shirt,” and that reporters should not be overly confident that they can resist a criminal subpoena even when judges are compelled—by statute or the First Amendment—to apply a balancing test. Anfinson Interview, *supra* note 312.

³⁶⁵ Freeman Interview, *supra* note 363.

³⁶⁶ Tomlin Interview, *supra* note 349.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ Anfinson Interview, *supra* note 312; Dreps Interview, *supra* note 358.

good as our lawyers,” and lawyers are more likely to secure a favorable outcome by showing their teeth at the outset.³⁷⁰

Unfortunately, too many lawyers are surrendering earlier in that process because of their perceptions about the state of the law and the fading receptivity of judges.³⁷¹ Burton says that a lot of media organizations have become “gun shy” in this new environment, which is exacerbated by media consolidation and the weakening economy. Because so many media companies are part of larger corporate entities with a different set of conflicts and profit expectations, some organizations are losing their institutional enthusiasm for mounting costly defenses in subpoena cases. Burton says she is fortunate to work for a pure media company. “We have the whole company behind us,” she said. “We don’t sell dishwashers, and we don’t allow the costs of defense, or fear of loss, dictate our strategy.”³⁷²

Lawyers who take a more cautious approach can certainly be forgiven; their first obligation is to serve their clients’ interests, not to act as guardians of principle. But those two purposes are not irreconcilable in this context. By complying too willingly, or not exhausting the negotiation process, lawyers not only encourage future litigants to use journalists as sources of evidence,³⁷³ they minimize in the public’s mind the magnitude of the harm posed by subpoenas. People are naturally going to assume that journalists are only opposed to those things that they aggressively resist. So, any unnecessary or excessive accommodation by journalists—even if part of a calculated, “pathological” effort to preserve core protections—may ultimately weaken the privilege in the long term.

These problems are compounded by what is happening in the broader public debate where the participants routinely portray the privilege in the narrowest terms and with their attentions focused on instrumental values and the interests of sources.

D. Conceptual Compression in Public and Scholarly Discourse

It is no coincidence that the transition from the expansion period of the reporter’s privilege to this new pathological period corresponds with the more general withering of the public’s esteem for journalists. According to the First Amendment Center’s annual survey, 40% of the public says the

³⁷⁰ Burton Interview, *supra* note 21.

³⁷¹ See Jones, *supra* note 18, at 661 (noting that media organizations complied fully with 60.1% of the subpoenas they received in 2001).

³⁷² Burton interview, *supra* note 21.

³⁷³ Burton said that in her experience “the more you respond [to subpoenas] the more you get.” *Id.*

press has “too much freedom” while only 10% says it has “too little,”³⁷⁴ and the overall trajectory of public support for and confidence in the press has declined steadily since the mid-1970s.³⁷⁵ Journalists have always struggled to convince the public that their ability to uncover the truth requires a set of protections that are not afforded to the public generally, but the problem is acute today with the deterioration of ethical standards in the mainstream media, the proliferation of journalistic charlatans who taint the image of more credible practitioners, and other changes that are inspiring doubts about the strength and sincerity of the press’ commitment to the public interest.³⁷⁶

Of course, the claim that the reporter’s privilege is a special right is largely a mischaracterization. That critique is only apt where the protection is tied to an expert definition of the press that assigns the privilege to certain *types* of journalists who have an approved set of credentials or institutional affiliations. The privilege is better understood, however, as a protection that applies to anyone who serves a journalistic function. Unfortunately, there are still some shield laws—including the House version of the FFIA—that use expert definitions, which not only fly in the face of a principle-based conception of the privilege, but they enable those who seek to portray the privilege as a manifestation of press exceptionalism.

Some of the more recent legal scholarship has reinforced this expert view. Lawrence Alexander, for example, proposed that the privilege be extended only to those who gather and disseminate “news,”³⁷⁷ Kara Larsen suggested excluding bloggers and other nontraditional journalists who are not “regularly engaged in newsgathering,”³⁷⁸ and Scott Neinas proposed that the privilege be reserved for “working journalists.”³⁷⁹ These proposals are not as broad as they ought to be under a principle-based, fundamental-rights view of the privilege; nevertheless, they represent relatively minor delimitations compared to some of the other recent scholarship that either rejects the

³⁷⁴ FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 1 (2006), http://www.firstamendmentcenter.org/about.aspx?item=state_first_amendment_2006.

³⁷⁵ See Michael Shudson & Danielle Haas, *Who Hates the Press?*, COLUM. JOURNALISM REV. 70, 70 (Nov.–Dec. 2007).

³⁷⁶ See generally Robert W. McChesney, COMMUNICATION REVOLUTION: CRITICAL JUNCTURES AND THE FUTURE OF MEDIA (2007).

³⁷⁷ Alexander, *supra* note 29, at 99.

³⁷⁸ Larsen, *supra* note 70, at 1268.

³⁷⁹ Scott Neinas, Comment, *A Skinny Shield Is Better: Why Congress Should Propose a Federal Reporters’ Shield Statute That Narrowly Defines Journalists*, 40 U. TOLEDO L. REV. 225 (2008). Similar proposals have been made in previous periods. See, e.g., David Joseph Onorato, Note, *A Press Privilege for the Worst of Times*, 75 GEO. L.J. 361, 362 (1986) (endorsing shield protection for the institutional press).

legitimacy of the privilege altogether³⁸⁰ or that endorses a substantially truncated version of it.³⁸¹

The changing tenor of the *public* debate is even more remarkable and perhaps more consequential than the ones occurring among scholars and judges. Because the battle over the privilege is now being fought in Congress and the state legislatures, the framing of the debate and the conceptions of the privilege advanced by policymakers, journalists and others are critical. Yet in those debates the privilege is almost always portrayed in narrow terms and is supported by policy-based rationales. Reps. Mike Pence and Rick Boucher, co-sponsors of the House version of FFIA, have defended their proposed legislation in newspaper commentaries and public comments by emphasizing the public's interests rather than those of reporters. This appears to be a deliberate strategy to beat back the special-rights critiques. Pence told members of the American Society of Newspaper Editors to "[c]onvey to [their] legions of readers around the country that this is not about protecting reporters, it is about protecting the people's right to know."³⁸² In a commentary in the *Richmond Times Dispatch*, Boucher wrote that protecting sources would advance "the public's right to know" and provide "a stronger underpinning of both freedom of the press and free speech in future years."³⁸³ The emphasis on the free flow of information is certainly warranted; it is a value that undergirds nearly everyone's conception of the privilege. But the only harms about which Boucher expresses concern are those tied directly to the absence of source protection.³⁸⁴ And by emphasizing the free speech rights of sources, he leaves the impression that the shield is as much about protecting whistleblowers as it is about press independence.

³⁸⁰ See, e.g., Eliason, *supra* note 29, at 385–87; John D. Castiglione, *A Structuralist Critique of the Journalist's Privilege*, 23 J. L. & POL. 115, 129–30 (2007) (arguing that a reporter's privilege functions more as a privilege for government leakers, which in turn upsets the "constitutional order" by creating power imbalances among the branches of government).

³⁸¹ See, e.g., Larsen, *supra* note 70, at 1268 (supporting shield law, but only for confidential sources); Clark, *supra* note 29, at 369 (rejecting extension of the privilege for nonconfidential information).

³⁸² Tom Scarritt, Editorial, *Protecting Your Right to Know*, BIRMINGHAM NEWS, Apr. 1, 2007, at C1. Other members of Congress, including Sen. Arlen Specter, have used the same approach. See Arlen Specter, Op-Ed., *Why We Need a Shield Law*, WASH. POST, May 5, 2008, at A17 ("But a media shield law would not primarily be protection for journalists; it would be protection for the public and for our form of government.").

³⁸³ Rick Boucher, Op-Ed., *Freedom of Press: Federal Sources Legislation Protects Public's Right to Know*, RICHMOND TIMES-DISPATCH, Mar. 12, 2006, at E1.

³⁸⁴ Boucher expressed concern about the "chilling effect" of subpoenas, but only as it related to the willingness of sources to come forward. *Id.*

Boucher and Pence's arguments mirror the rhetorical approaches used by many other advocates for the privilege, including the authors of most of the hundreds of pro-privilege newspaper editorials and columns published in the past several years.³⁸⁵ Those proposals typically present the privilege as solely a protection for confidential information;³⁸⁶ they emphasize the rights of the sources,³⁸⁷ and they point to the immediate public benefits that would result from shielding whistleblowers,³⁸⁸ all while ignoring the broader autonomy and fundamental-rights arguments³⁸⁹ and the egalitarian conception of the

³⁸⁵ From January 2005 through August 2008, daily newspapers in the U.S. published more than 300 editorials, and scores more columns and Op-Ed. pieces, addressing various aspects of the privilege, with the vast majority focused on the merits of state or federal shield legislation. The author of this Article used Lexis-Nexis to access and review those publications. This was not a systematic study but a more informal effort to identify the ways in which newspaper editorial writers were framing the issue and the lines of argument they employed.

³⁸⁶ All of the hundreds of editorials examined by the author presented the privilege as being primarily or exclusively about protecting confidential-source information. *See, e.g.*, Editorial, *A Needed Shield*, WASH. POST, Oct. 4, 2007, at A24 ("The Senate Judiciary Committee will mark up a bill today that would protect the relationship between journalists and their confidential sources at the federal level."); Editorial, *Defending Press Freedom*, N.Y. TIMES, Oct. 22, 2007, at A20 ("[T]he House voted 398 to 21 for a much-needed measure that would help protect reporters from being forced to reveal confidential sources in federal court."); Editorial, *Sunshine Award*, RICHMOND TIMES-DISPATCH, Apr. 18, 2008, at A12 ("The legislation would shield journalists from being compelled to identify their sources . . .").

³⁸⁷ Much like Rep. Boucher, the editorial writers and columnists have shifted the attention away from the reporters and toward the sources, or the public. *See, e.g.*, Editorial, *Shield Guards the Nation*, BUFFALO NEWS, Oct. 15, 2007, at A10 ("[I]f we, the people of the United States, want to know what our government is doing, in our name and with our money, we cannot always count on our government to tell us."); Editorial, *Shield Law Must Advance*, S.F. CHRON., Oct. 3, 2007, at B8 ("The shield measures would bring federal law into line with the overwhelming majority of states that recognize confidential sources are essential to reporting the news—and protecting the public's right to know.").

³⁸⁸ *See, e.g.*, Editorial, *Protect Reporters, Citizens*, PALM BEACH POST, May 14, 2008, at 8A ("What citizens don't know can hurt them, and citizens who know of wrongdoing deserve support in coming forward.").

³⁸⁹ These arguments were not entirely absent, although they were uncommon and often appeared in the form of general references to press independence. *See, e.g.*, Editorial, *Shield the Press*, PRESS-ENTERPRISE, July 7, 2005, at B8 ("If the media are to function as independent watchdogs of government, then media sources cannot be subject to government reprisals for speaking out.").

press.³⁹⁰ Indeed, some of those authors and advocates even concede to their opponents that the privilege is a “special protection.”³⁹¹

The opponents of the privilege, despite being wildly outnumbered in the editorial space, have unleashed a full arsenal of arguments with the apparent goal of not only knocking down the shield-law bills, but of obliterating the entire concept of a journalist's privilege.³⁹² The advocates for the privilege, by comparison, are using a smaller pallet of arguments that are drawn from a narrow conception of the privilege and that are loaded up with qualifiers designed to appease their critics: “The First Amendment was not written for us; it was written for you,”³⁹³ the shield law's primary purpose is not to create “some special perk just to protect journalists . . . it truly protects . . . [the public's] right to know.”³⁹⁴ The shield bills “do not provide,

³⁹⁰ Most editorials do not address the definition of a journalist directly, except occasionally to acknowledge the definitional difficulty and to suggest that it is not insurmountable. *See, e.g.*, Editorial, *Only a Shield Law Can Thaw the Chill*, BOSTON HERALD, July 12, 2005, at 24 (noting that a proposed shield law in Massachusetts would likely encompass many bloggers, but adding that “during the last presidential election, many bloggers earned the right to be considered serious gatherers and disseminators of news.”).

³⁹¹ *See The Kathleen Dunn Show* (Wisconsin Public Radio broadcast, Aug. 13, 2008) (airing comment from Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press: “I agree that what journalists are asking for is special. Journalists need to realize this and to be humble about it.”); Penrod, *supra* note 346, at 6 (quoting American Association of Newspaper Editors lawyer Kevin Goldberg, “In a way it may be special protection for journalists, but it may be one whose time has come”); Scarritt, *supra* note 382 (“Many of us in the press get a bit uncomfortable when we start discussing special treatment for ourselves”).

³⁹² *See, e.g.*, Michael Battle, Op-Ed., *No Special Privilege*, USA TODAY, June 22, 2006, at 12A (suggesting that a shield law is “dangerous” and would imperil national security); Bruce Fein, Op-Ed., *Privilege Obstructs Justice*, USA TODAY, May 14, 2007, at 10A (“A federal newsman's privilege would enable journalists to conceal confidential communications relevant to proving criminal or civil wrongdoing. In other words, it would obstruct justice.”); Glenn Harlan Reynolds, Op-Ed., *No ‘Freedom to Keep Secrets,’* USA TODAY, Mar. 10, 2008, at 10A (“The Constitution merely protects the freedom of speech and publication—not the freedom to keep secrets, which is what journalists are asking for when they seek special privileges of non-disclosure.”); Eugene Volokh, Op-Ed., *You Can Blog, but You Can't Hide*, N.Y. TIMES, Dec. 2, 2004, at A39 (asserting the impossibility of defining “journalist”).

³⁹³ Scarritt, *supra* note 382.

³⁹⁴ Dale Davenport, Op-Ed., *Watchdog Role: Shield Laws Aren't Just for Journalists, They Protect Everyone*, PATRIOT NEWS, May 27, 2007, at F4.

nor does the media seek, [an] absolute privilege;”³⁹⁵ “[t]he journalist is merely the conduit;”³⁹⁶ and so on.

There is an almost apologetic tone that runs through many of these editorial arguments, and a “pathological” resignation to the idea that the privilege, in its ideal form, is now wholly out of reach. As a result, many proponents urge their colleagues to be pragmatic in the face of all the obstacles, to “take what [they] can get,”³⁹⁷ to recognize that “a limited privilege . . . is better than none,”³⁹⁸ and not to risk it all “by being absolutist.”³⁹⁹ Journalists’ caution is understandable. They do not want to appear strident when seeking to change the status quo (at least in the context of shield laws), particularly when that change depends on the magnanimity of policymakers and the public. But these rhetorical tactics, if that is all they are,⁴⁰⁰ could have some unintended consequences.

By building the privilege around policy arguments and the value of anonymous disclosures, journalists begin to lose control of the privilege by vesting it with their sources and encouraging the view that the protection belongs to (and may therefore be waived by) the source. In addition, the emphasis on sources implies that confidentiality is the *sine qua non* of the privilege, and that journalists’ resistance to nonconfidential subpoenas is just a gratuitous self-indulgence. Finally, by emphasizing the public-interest benefits of confidential-source disclosures while ignoring the broader autonomy arguments, proponents of the privilege make themselves vulnerable to those who would apply short-term public-interest criteria to assess the harm that specific subpoenas pose to journalists,⁴⁰¹ those who would demand empirical evidence that subpoenas inhibit sources from

³⁹⁵ Editorial, *Shield Law Helps Us Protect You*, BUFFALO NEWS, July 25, 2005, at A6.

³⁹⁶ Doug Clifton, Editorial, *Sources and Journalists Must Be Protected by Law*, CLEVELAND PLAIN DEALER, Feb. 10, 2005, at B9.

³⁹⁷ Westphal, *supra* note 20.

³⁹⁸ Jack Nelson, Op-Ed., *A Limited Shield Law for Reporters Is Better Than None*, SALT LAKE TRIBUNE, June 30, 2006.

³⁹⁹ Westphal, *supra* note 20.

⁴⁰⁰ A more troublesome possibility is that many of these contributors have already internalized a narrower view of the privilege and that these rhetorical approaches are not merely tactical choices, but honest reflections of the contributors’ conceptions of the privilege.

⁴⁰¹ See *supra* notes 144–45 and accompanying text.

coming forward,⁴⁰² and those who view the privilege as little more than an indemnity for leakers and turncoats.⁴⁰³

On a more fundamental level, all of this rhetorical framing provides an unsteady foundation for the privilege, making it less resistant to the inevitable attempts in the future to taper or eliminate it. Judges could also be influenced by the scope and tenor of the public discussion. It would be ideal if judges were inattentive to these extra-judicial debates, but there is no doubt that judges are cognizant of public opinion, and as media consumers themselves, they have their own ideas about what the press needs or, indeed, deserves.

V. CONCLUSION

The early twenty-first century has the potential to be a renaissance period for American journalism with the emergence of new storytelling tools and the disappearance of many of the old entry barriers. Unfortunately, the liberation of the *craft* of journalism is occurring contemporaneously with a contraction of the *law* of journalism. This is especially evident in the reporter's privilege context where judges are narrowing the scope of longstanding protections and softening their applications of established criteria. The great period of reporter's privilege expansion that began after *Branzburg* has ended, and journalists have reason to worry about a continuing backslide, despite efforts by Congress and some state legislatures to mitigate these harms through statute.

Too many journalists have responded to the judicial retreat by favoring a truncated conception of the privilege that focuses on the interests of sources and that emphasizes the instrumental value of confidentiality. In their responses to particular court rulings, and in their efforts to secure shield-law protection, some have portrayed the privilege—whether subconsciously or as an intentionally “pathological” response to mounting opposition—as little more than whistleblower protection. In the process, they have weakened, through neglect, some of the key theoretical pillars that support the larger concept of a reporter's privilege.

As for journalists' lawyers, most have steadfastly sought to secure and preserve the broadest possible protections for their clients. But many of them, too, are conceding points that they might have contested in the past, and too

⁴⁰² See Eliason, *supra* note 29, at 417–18.

⁴⁰³ See Castiglione, *supra* note 380, at 119; Matthew Pollack, *Pence and Mukasey Square off on Shield Bill*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, July 23, 2008, <http://www.rcfp.org/newsitems/index.php?i=6881> (quoting Former Attorney General Michael Mukasey: “What I’m not willing to do is to take steps that will essentially do more to protect leakers than it does to protect journalists.”).

many of them are—as Burton points out⁴⁰⁴ and as the data from Jones' study reveal⁴⁰⁵—complying with subpoenas with little resistance. To the extent that these lawyers are merely being pragmatic, their responses are defensible. They have to serve their clients first, take the law as it is, and avoid the risk, as Freeman said, “of making the law in general worse”⁴⁰⁶ by inviting rulings from skeptical judges. But these capitulations, combined with journalists' increasingly accommodationist rhetoric, invite judges, litigants and policymakers to minimize the actual harms posed by subpoenas and to reinforce the view that the privilege is just a generous public policy rather than a resolute principle. Journalists, media lawyers and pro-privilege legislators would do better in the long run if they started speaking about the reporter's privilege as a right, writing about it as a right, and litigating it as a right.

The more significant change, however, needs to come from the judiciary. Courts need to reorient their reporter's privilege doctrine, starting from the premise that it is a constitutional right, or, alternatively, that it is the manifestation of a principle that transcends the normal policy concerns and that warrants recognition under the common law. They need to acknowledge that the right to gather news is an individual right, claimable by anyone who serves the purposes for which the protection exists, and that while there is an important social-structural purpose that underlies the privilege, recognition of the protection should not depend on the demonstration of discrete public benefits in every instance. If judges conceived of the privilege as a right and as a matter of principle, they would have no choice but to embrace an egalitarian definition of the press and to abandon any partitioning of the privilege in which its protections are available in some contexts and wholly invisible in others. Finally, they would have to embrace tests that provide a more formidable obstacle for subpoenaing parties and to demand that in applying those criteria, judges remain cognizant of the subtle, incremental and even symbolic harm that excessive subpoenas can cause.

⁴⁰⁴ See *supra* notes 360–61 and accompanying text.

⁴⁰⁵ See Jones, *supra* note 18, at 661.

⁴⁰⁶ Freeman Interview, *supra* note 363.